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Second, as the Smith opinion candidly acknowledges, its interpretation will place "those religious practices that are not widely engaged in" at a "relative disadvantage." n112 Some religions are close to the center of prevailing culture in America. Their practices rarely, if ever, will conflict with an "otherwise valid law," n113 because, in a democracy, the laws will reflect the beliefs and preferences of the median groups. Religious groups whose practices and beliefs are outside the mainstream are most likely to need exceptions and accommodations. If most Americans shared the Quakers' attitudes toward immigration, we would not sanction employers for employing aliens; if most residents of the District of Columbia shared the Catholic teaching on sexuality, the District would not forbid discrimination on the basis of sexual preference. Moreover, only some of the religious groups in need of exceptions and accommodations will win the ear of the legislature. Those groups whose beliefs are least foreign and least offensive to the mainstream, and those with the largest numbers and greatest visibility, will be better able to protect themselves than will the smaller, more unpopular groups. Smith thus not only increases the power of the state over religion, it introduces a bias in favor of mainstream over non-mainstream religions. That bias may not displease those who believe in the wisdom and virtue of majoritarian culture, but it is not consistent with the original theory of the Religion Clauses.

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n112 Smith, 110 S Ct at 1606.

n113 Id at 1600.

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Third, the Smith Court treated the claim for a free exercise exemption as essentially a request for a special benefit. In an earlier opinion, Justice Scalia, the author of Smith, characterized free exercise exemptions as "intentional governmental advancement" of religion. n114 This misstates the issue. The Native American Church was not asking government for "advancement"; it was asking to be left alone. When the government criminalizes the religious ritual of a church, it "prohibits" the free exercise of religion in the most direct and literal sense of the word. If the courts cannot distinguish the failure to "prohibit" from the decision to "advance," it is no wonder that their decisions are so confused. To conceive of free exercise exemptions as requests for special benefits implicitly assumes that the state has the natural authority to regulate the church, and that choosing not to do so is a favor. That is not the [*140] inalienable right to freedom of religion conceived by those who wrote and ratified the First Amendment.

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n114 Edwards v Aguillard, 482 US 578, 617 (1987) (Scalia dissenting).

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Finally, Smith converts a constitutionally explicit liberty into a nondiscrimination requirement, in violation of the most straight-forward

interpretation of the First Amendment text. If the Constitution guaranteed the "right to own cattle," who would interpret it to allow the government to ban the ownership of all animals, so long as cattle are not "singled out"? The freedom of citizens to exercise their faith should not depend on the vagaries of democratic politics, even if expressed through laws of general applicability.

B. Establishment

The Rehnquist Court's greatest contributions to Establishment Clause doctrine have been its dismantling of some of Lemon's mistakes. In Corporation of Presiding Bishop v Amos, n115 the Court removed the most serious doctrinal obstacles to legislative accommodations of religion. For the first time, the Court held unequivocally that the government may exempt religious organizations from a regulatory burden, even when not required to do so under the Free Exercise Clause. The Court did not abandon the Lemon test, but held that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission," n116 and that the effects test is not necessarily violated by "statues that give special consideration to religious groups." n117 In Board of Education v Mergens, n118 the Court upheld the Equal Access Act, which requires public schools to permit religious (as well as political and philosophical) student clubs to meet on school premises on the same terms as other noncurricular clubs. The Court rejected the argument that religious activities must be excluded from any officially-sanctioned presence within a public school, on the ground that secularism can be counter to neutrality: "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." n119 The degree to which this decision breaks with the old jurisprudence is shown by the fact that four of the five [*141] courts of appeals to rule on the issue had held, under Lemon, that it would be unconstitutional to allow student religious clubs to meet. n120 In Bowen v Kendrick, n121 the Court made strides toward allowing religiously affiliated organizations to participate in publicly funded educational and social welfare programs on an equal basis with secular groups. The implications of these decisions will be discussed at greater length in Section III.

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n115 483 US 327 (1987).

n116 Id at 335.

n117 Id at 338.

n118 110 S Ct 2356 (1990).

n119 Id at 2371.

n120 Brandon v Board of Education, 635 F2d 971 (2d Cir 1980); Lubbock Civil Liberties Union v Lubbock Independent School Dist., 669 F2d 1038 (5th Cir 1982); Nartowicz v Clayton County School Dist., 736 F2d 646 (11th Cir 1984); Garnett v Renton School Dist., 874 F2d 608 (9th Cir 1989), cert granted, judgment vacated, and case remanded, 110 S Ct 2608 (1990), on remand, 772 F Supp 531 (W D Wash 1991). Only the lower court in Mergens, in the Eighth Circuit, had upheld the Act. Mergens v Board of Education, 876 F2d 1076, 1079-80 (8th Cir 1989).

n121 487 US 589 (1988).

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Notwithstanding these encouraging decisions, the course of Establishment Clause doctrine remains very much in doubt. In none of these cases did the Court explicitly announce a change in doctrine. Amos was important in establishing the legitimacy of accommodation, but left the limits of the accommodation doctrine unclarified. Mergens is unlikely to have much application outside of its particular context. Kendrick entailed a rather unpersuasive manipulation of the ambiguous concepts of the Lemon test. It augured doctrinal change, but provided no hint of what form the change may take. n122 The Court may well adopt an affirmatively pluralistic interpretatin of the Establishment Clause, as is discussed in Section III, but it might also retreat to a posture of deference to majoritarian decisionmaking. In the remainder of this Section, I will discuss the specific proposals by members of the new Court for revising the Lemon test.

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n122 On its surface, Kendrick appeared to confine the rigors of the Lemon test to elementary and secondary education. But there is no persuasive reason to single out the educational sector for special constitutional rules.

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1. Dropping the entanglement prong.

Three members of the Court have proposed modifying the Lemon test by eliminating the third prong, "entanglement", which some have blamed for the chaotic and inconsistent results of the Court's establishment cases. n123 Justice White has attacked and ridiculed the entanglement prong ever since his dissent in Lemon itself, n124 [*142] calling it "curious and mystifying," "insolubly paradoxical," "redundant," "superfluous," and without "constitutional foundation." n125 Recently Chief Justice Rehnquist and Justice O'Connor have joined him. n126 According to these Justices, state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. If a statute has neither a purpose nor an effect of advancing or endorsing religion, these Justices "would not invalidate it merely because it requires . . . some state supervision to ensure that state funds do not advance religion." n127

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n123 See, for example, Justice O'Connor's dissent in Aguilar, 473 US at 430. See also Jesse Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U Pitt L Rev 673, 681 (1980).

n124 Lemon, 403 US at 661-71 (White dissenting).

n125 See Roemer v Maryland Public Works Bd., 426 US 736, 768-69 (1976) (White concurring) (quoting earlier opinions).

n126 Aguilar, 473 US at 430 (O'Connor, joined by Rehnquist, dissenting).

n127 Id.

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Without modifying the effects prong, however, eliminating the entanglement prong could actually make matters worse. No longer would there be a constitutional obstacle to the government surveillance needed to ensure that funds are not used to "advance religion" (as that concept is misleadingly employed in the Lemon cases). The state could root out religious elements in the activities of all religious organizations participating in public programs. The effects prong without the entanglement prong imposes a classic unconstitutional condition: the recipient may receive benefits to which it is otherwise entitled under neutral criteria, if and only if the recipient waives its freedom of speech with respect to religion. For example, in Lemon itself, by agreeing to pay fifteen percent of the salaries of teachers in parochial schools, the state would have obtained not only the warrant, but the constitutional obligation, to ensure that those teachers excised any religious content from their classes, one hundred percent of the time. Only the entanglement prong of Lemon stood in the way. The Lemon Court held that the governmental interference with the operations of the parochial school which would have been necessary to enforce the secular use limitation was an unconstitutional entanglement between church and state; thus the Court denied the aid altogether. n128 In other words, the entanglement prong averted the unconstitutional condition by refusing to permit aid even if the school were willing to waive its freedom of speech.

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n128 Lemon, 403 US at 611-25.

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Parochial school supporters universally perceived the result in Lemon as a disaster. But without the entanglement prong, the program [*143] at issue in Lemon would have effectively destroyed religious education. Few schools could have resisted an offer of subsidies for their teachers' salaries, and the curriculum of the parochial schools would have become indistinguishable from that of the public schools. Under Allen, the religious schools would have received free textbooks, provided that those textbooks were strictly secular. Under Lemon faculty salaries would have been subsidized, provided that their classroom teaching was strictly secular. Religion would have become irrelevant to the core educational offerings of the school. The entanglement prong of the Lemon test, which cut religious schools off from funding, and thus from secularization, was a blessing in disguise for religious choice and diversity.

2. Dropping the purpose prong.

In a 1987 opinion joined by Chief Justice Rehnquist, Justice Scalia urged "[a]bandoning" the first prong of the Lemon test, the requirement of a "secular purpose." n129 He relied on two major points: (1) that it is not possible to determine legislative purpose; n130 and (2) that the Court has not clearly defined the requirement of a "secular purpose." n131 The first point is not peculiar to the Religion Clauses. Indeed, the argument about legislative purpose is one of the most important questions cutting across the fields of constitutional law. It affects everything from the Equal Protection Clause to

the Commerce Clause to the Bill of Attainder Clause. n132 I shall not enter into the debate here, other than to say that it would be unprincipled to abandon the purpose prong of the Lemon test on these grounds if the Court intends to inquire into legislative purpose in other contexts.

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n129 Edwards, 482 US at 640 (Scalia dissenting).

n130 Id at 636-39.

n131 Id at 613-19.

n132 John Hart Ely's analysis of this issue, though more than twenty years old, is still the best general study of the question. See John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L J 1205 (1970). With reference to the Religion Clauses, Ely advocates making illicit purpose a necessary, as opposed to a sufficient, element of the constitutional claim. Id at 1314.

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Scalia's second point about the purpose prong is more telling. The Court has been singularly unhelpful in defining the requirement of a "secular purpose." Does it mean that the legislature may not have been motivated by "religious considerations?" n133 This definition would render all religious accommodations suspect, for [*144] reasons discussed above. n134 Does it forbid the legislature from making religiously-informed judgments, or basing legislation on the religiously-informed judgments of their constituents? This definition would be bizarre, for religion remains the single most important influence on the values of ordinary Americans. Are laws against stealing suspect because most Americans would identify the Ten Commandments as the source of their moral intuition against theft? Left undefined, the purpose prong is an invitation to mischief -- a not-so-subtle suggestion that those whose understandings of justice are derived from religious sources are second-class citizens, forbidden to work for their principles in the public sphere. This understanding would be a sharp and unwarranted break from our political history. From the War for Independence to the abolition movement, women's suffrage, labor reform, civil rights, nuclear disarmament, and opposition to pornography, a major source of support for political change has come from explicitly religious voices.

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n133 Lynch, 465 US at 680.

n134 See text accompanying notes 72-75.

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Nonetheless, abandoning the purpose prong would be an over-reaction. Legislative purpose is relevant in at least two contexts. First, one element in the Establishment Clause analysis of a statutory program is whether its benefits are available generally, to nonreligious and religious recipients alike. Purpose is a necessary backstop to facial neutrality. A law's facially neutral categories may be pretextual, especially where they produce disproportionate

effects. The absence of a strong secular justification for the categorization is the best evidence that the program favors religion over nonreligion, or one religion over another. n135

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n135 The same is true for free exercise cases: a facially neutral rule that "happens" to bear most heavily on a particular religious practice should not be sustained without persuasive secular justification. A law outlawing all hallucinogenic drug use is nondiscriminatory; a law outlawing only peyote use would, in all likelihood, be a measure directed against the Native American Church. Under the legal framework of Smith, an inquiry into purpose is more necessary than ever before.

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Second, a program with an effect that favors one religion may nonetheless be constitutional if there is a powerful secular justification for it. The National Holocaust Memorial in Washington contains many exhibits that pertain to the Jewish religion; but the obvious historical justification for "singling out" Judaism in this context should rescue it from any establishment challenge. Similarly (though less clearly), Congress made a large grant to the Roman Catholic Church a few years ago for the purpose of assisting illegal aliens in applying for amnesty under the Immigration Reform [*145] Act. n136 Though the effect was discriminatory, the justification was strong: the target population is understandably mistrustful of government agents and the Catholic Church is uniquely positioned to reach them.

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n136 The Immigration and Naturalization Service contracted with "qualified designated entities" (QDEs) to perform most of these services, paying them $ 15 for each application processed. Cheryl Devall, Legal Status for Illegal Aliens Right Around Corner, U.S. Says, Chi Trib 3 (May 3, 1987). The U.S. Catholic Conference, acting through its dioceses, was the most prominent QDE: by early 1987, the Catholic Charities of Los Angeles alone had registered 276,000 probable applicants. David Holley, Groups in L.A. Ready to Assist Aliens Listed, LA Times A1 (Apr 24, 1987).

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These considerations suggest that, instead of abandoning the inquiry into purpose, the Court should define the concept more carefully. But even if Justice Scalia were correct that the purpose prong should be abandoned, this modification to the Lemon test would be of relatively little consequence. Situations in which the legislature lacks any secular justification for its actions are rare, and in the vast majority of cases the Court has found the purpose prong easily satisfied. In only four cases has the Supreme Court struck down a statute because it lacked a secular purpose, n137 and in three of those cases the Court would likely have found the statutes unconstitutional on other grounds if it had not used the purpose test. n138 The purpose prong is the least significant part of the Lemon test, and eliminating it would do little to solve the problems created by Lemon.

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n137 Edwards, 482 US at 585-89; Jaffree, 472 US at 56; Stone v Graham, 449 US 39, 40-41 (1980); and Epperson, 393 US at 106-07.

n138 Jaffree is the exception.

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3. Nonpreferentialism.

In several opinions in 1985, then Associate Justice Rehnquist urged that the Establishment Clause be interpreted solely to forbid "establishment of a national religion" and "preference among religious sects or denominations." n139 According to Rehnquist, "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." n140 Rehnquist, who has not mentioned this suggestion since, may have abandoned it. Although the nonpreferentialist position may lead to correct results in a large number of cases, it is theoretically unsound. Under that approach, the government could use its taxing [*146] and spending power to augment the position and resources of the religious sector -- an effect that is no less objectionable than augmenting the secular sector under the Lemon test.

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n139 Jaffree, 472 US at 106 (Rehnquist dissenting).

n140 Id.

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Rehnquist proposed the nonpreferentialist approach on the strength of certain seemingly powerful evidence of the original understanding. n141 Since that time, however, more complete historical research has refuted the nonpreferentialist argument. n142 I do not expect nonpreferentialism to figure prominently in future decisions.

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n141 Rehnquist's dissent in Jaffree closely followed the historical research of Robert L. Cord, Separation of Church and State (Lambeth, 1982). See also Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (American Enterprise Institute for Public Policy Research, 1978).

n142 See Douglas Laycock, The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm & Mary L Rev 875 (1986). Dean Rodney Smith has offered a rebuttal to Laycock, but his principal argument seems to be with Laycock's use of the term "nonpreferentialism" rather than with Laycock's historical analysis of Rehnquist's position. Rodney K. Smith, Nonpreferentialism In Establishment Clause Analysis: A Response To Professor Laycock, 65 St John's L Rev 245 (1991). Smith distinguishes among three possible forms of "nonpreferentialism," of which Smith supports one (nonpreferentialism as to matters of conscience) and

Laycock supports another (nonpreferentialism between religion and nonreligion). Id at 247-48. Smith and Laycock both reject the third (nonpreferentialism among religions), which is what Laycock means by "nonpreferentialism," and which represents Justice Rehnquist's position in the Jaffree dissent.

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Indeed, in the years since 1985, Rehnquist has joined opinions for the Court that implicitly reduce the standard of review for government actions that discriminate among religions. n143 These actions used to receive "strict scrutiny," even more difficult to satisfy than the Lemon test. By contrast, the Smith opinion observed:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs. n144

[*147] This language indicates that the Justices who make up the working majority on the Rehnquist Court consider the principle of denominational neutrality to be less important than the need to avoid balancing tests. In Hernandez v Commissioner, a shocking decision that received little attention, the Internal Revenue Service had denied tax deductions to members of the Church of Scientology for certain fixed-price payments they made to participate in worship services. n145 The IRS had a formal written policy of allowing deductions for comparable practices by other religions, such as pew rent and the sale of tickets to Jewish high holy days, and the government offered no explanation for treating the Scientologist differently. n146 The Court nonetheless upheld the action, reasoning that "the IRS m[ight] be right or wrong with respect to these other faiths," and that the Court would have to wait for a more complete factual record about the other faiths before reviewing the allegation of discriminatory treatment. n147 This reasoning empties the requirement of equal treatment of any force, since the government is free to continue to treat Protestants and Jews in one way and Scientologists in another. Only Justices O'Connor and Scalia dissented in Hernandez; Justices Brennan and Kennedy did not participate in the decision.

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n144 Smith, 110 S Ct at 1606.

n145 490 US 680 (1989).

n146 Id at 701-03.

n147 Id at 702-03.

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Hernandez suggests that, far from making the principle of denominational neutrality the exclusive focus of Establishment Clause analysis, the Rehnquist Court is discarding or neglecting it. This trend will only exacerbate the Court's tendency toward acquiescence in governmental decisions that favor

mainstream religious traditions.

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n145 490 US 680 (1989).

n146 Id at 701-03.

n147 Id at 702-03.

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4. The endorsement test.

A more prominent alternative to the Lemon test is the so-called "endorsement test," first proposed by Justice O'Connor in a concurring opinion n148 and sporadically embraced by opinions for the Court in subsequent cases. n149 According to Justice O'Connor, the most "direct infringement [of the Establishment Clause] is [*148] government endorsement or disapproval of religion." n150 She explained that

Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message. n151

There is some appeal to the endorsement concept, principally because it focuses on how the governmental practice affects the "outsider," which I take to mean the religious minority. There is no obvious merit in government action with the sole purpose or effect of endorsing one religious belief over another, since the government is unlikely to be a valuable contributor to our understanding of spiritual truth. Notwithstanding its initial appeal, however, the endorsement test is not an attractive alternative to the Lemon test, for several reasons. n152

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n148 Lynch, 465 US at 688 (O'Connor concurring).

n149 Grand Rapids, 473 US at 389-90; Mergens, 110 S Ct at 2371-72; Edwards, 482 US at 587; Allegheny, 492 US at 592-93.

n150 Lynch, 465 US at 688 (O'Connor concurring).

n151 Id.

n152 For other arguments in opposition to the endorsement test, see Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich L Rev 266 (1987).

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a) The impossibility of defining "endorsement." First, the very "goal" of the endorsement test, according to Justice O'Connor, is to identify a principle that is " 'not only grounded in the history and language of the first amendment,

but one that is also capable of consistent application to the relevant problems.'" n153 Yet this goal of consistency is the test's greatest failing. There is no generally-accepted conception of what "endorsement" is, and there cannot be. Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no "neutral" position, outside the culture, from which to make this assessment. The bare concept of "endorsement" therefore provides no guidance to legislatures or lower courts about what is an establishment of religion. It is nothing more than an application to the Religion Clauses of the principle: "I know it when I see it." n154 Consider the following examples:

[*149] (1) How would the parochial school aid cases fare under the endorsement test? The majority position has been that most forms of aid to religious schools are impermissible, in part because it creates an appearance of a "symbolic union" between church and state. n155 A significant segment of the population believes that the use of government funds to assist religious education is tantamount to putting priests on the payroll. On the other hand, granting funds to secular schools but not to equally qualified religious schools creates at least the appearance of disapproval. Parents of children attending religious schools often claim they are treated as second-class citizens, unable to receive public benefits to which they would otherwise be entitled for the sole reason that the ideological content of the education they have chosen is religious.

(2) Does tax-exempt status convey a message of endorsement of churches? The government grants tax exemptions on the theory that exempt organizations provide benefits to the public. Including churches on this list implies that they are wholesome and beneficial institutions, especially when the statute mentions "churches" explicitly. But what message would be conveyed by excluding churches from the class of tax-exempt charities?

(3) Do public schools endorse religion if they refrain from teaching evolution? The majority of the Supreme Court so held, on the ground that disbelief in evolution is a tenet of fundamentalist Christianity. n156 A fundamentalist Christian might think, however, that teaching evolution without discussing creationist objections expresses disapproval of his religious view. n157 Justice Black, in confronting this issue, concluded that leaving evolution out of the curriculum was a neutral way to avoid taking an official position on a controversial religious issue. n158

(4) Did the government endorse religion by providing worship services to the men and women fighting the war against Iraq? Or would failure to do so have conveyed disapproval?

[*150] (5) Does exemption of religious organizations or of religiously motivated individuals from a law of general applicability "endorse" religion? Opponents of religious accommodations argue that "[s]pecial treatment for religion connotes sponsorship and endorsement" n159 and that exemptions "create[] ill will and divisiveness among the American people." n160 Justice O'Connor agrees that exemptions cause resentment, but holds that this resentment is "entitled to little weight" because accommodations promote the "values" of the Free Exercise Clause. n161 Others, such as Professor Laycock, say that exemptions do not appear to endorse religion at all. n162 I know all of these people to be reasonable observers, well schooled in the values underlying the First Amendment. That does not seem to help.

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n153 Jaffree, 472 US at 69 (O'Connor concurring) (citation omitted).

n154 See William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S Cal L Rev 495 (1986).

n155 Grand Rapids, 473 US at 389-92.

n156 Epperson, 393 US at 107-09.

n157 Others think so too. See Gregory Gelfand, Of Monkeys and Men -- An Atheist's Heretical View of the Constitutionally of Teaching the Disproof of a Religion in the Public Schools, 16 J L & Educ 271 (1987).

n158 Epperson, 393 US at 112-13 (Black concurring).

n159 William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U Chi L Rev 308, 320 (1991).

n160 Ellis West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J L Ethics & Pub Policy 591, 602 (1990).

n161 Jaffree, 472 US at 83 (O'Connor concurring).

n162 Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L Rev 993, 1003 (1990); Douglas Laycock, The Remnants of Free Exercise, 1990 S Ct Rev 1, 16-17.

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For each of the above questions, it is tempting to answer "yes" to both sides of the question -- the government action in question conveys endorsement, but the opposite action conveys disapproval. Any action the government takes on issues of this sort inevitably sends out messages, and it is not surprising that reasonable observers from different legal and religious perspectives respond to these messages in different ways. These examples raise some of the most important and most often litigated issues under the Establishment Clause, and the concept of endorsement does not help to resolve them.

To be sure, most of us have strong intuitions about how to resolve the foregoing examples. But those intuitions are based -- or should be based -- on substantive conceptions about the proper relationship between religion is an endorsement. Advocates of "facial neutrality" will take the position that any action that "singles out" religion for special treatment more favorable than that given to secular groups or ideologies is an endorsement. Accomodationists will say that benefits to religion that are either facially neutral or that accommodate the free exercise of religion are neutral in their [*151] symbolic effect, and that anything less would be an expression of disapproval. The concept of "endorsement" adds nothing to any of these analyses. Indeed, it detracts from the analysis, because it eliminates the need for the judge to explain the true basis for the judgment. A finding of "endorsement" serves only to mask reliance on untutored intuition. n163

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n163 Justice O'Connor has defended her endorsement test against the charge of indeterminacy. Allegheny, 492 US at 628-30 (O'Connor concurring). She admits that the test "may not always yield results with unanimous agreement at the margins," pointing out that this is equally true of other tests. Id at 629. But Justice O'Connor focuses her attention in this discussion solely on the religious symbols cases. My point is that the endorsement test is indeterminate in other contexts, where substantive doctrines provide reasonably clear guidance and superior results.

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b) Inconsistency with accommodation. Second, not only is the endorsement test indeterminate, it is not evenhanded. It perpetuates some of the implicit biases of the Lemon test. n164 The endorsement test casts suspicion on government actions that convey a message that religion is worthy of particular protection -- as any accommodation of religion necessarily does -- and thus encourages indifference toward religion. There is no way to distinguish between government action that treats a religious belief as worthy of protection, and government action that treats a religious belief as intrinsically valuable. Why accommodate religion unless religion is special and important? Justice O'Connor's endorsement test is therefore in tension with her accommodationist interpretation of the Free Exercise Clause.

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n164 See text accompanying notes 71-96.

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Justice O'Connor attempts to avoid this tension by specifying that her "reasonable observer" who is the judge of endorsement "would take into account the values underlying the Free Exercise Clause." n165 Presumably, the reasonable observer who is the judge of disapproval would similarly "take into account the values underlying" the Establishment Clause. But this attempt to reconcile accommodation to the endorsement test is circular. If our reasonable observers know the "values" underlying the Religion Clauses, and if those values are something other than endorsement and disapproval, what need have we of the endorsement test? We should look directly to the principles of the Free Exercise and Establishment Clauses and not be waylaid by issues of perception.

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n165 Allegheny, 492 US at 632 (O'Connor concurring).

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[*152] c) The bias against religion. Much like the effects prong of the Lemon test, n166 the apparent symmetry of the endorsement test -- its equal condemnation of actions that "endorse" and actions that "disapprove" religion -- is spurious. No court applying the test has ever struck down a governmental action because it appeared to "disapprove" of a religion. The reason lies in the structure of the Religion Clauses. Disapproval of religion is not an "establishment" of religion because the government typically has a secular

purpose for its action, and because there is no "religion" that is being "established." For example, when the New York public schools train their teenage pupils in the use of condoms, this plainly creates an appearance of "disapproval" of a tenet of the Roman Catholic Church. (Imagine the reaction if the schools instructed their students in the method of natural family planning.) But there is no "religion" of condom advocacy on the other side -- nothing but a particular secular view regarding public health and sexual hygiene. To solve difficulties of this sort, attorneys for traditionalist parents have tried to portray secular ideology as the religion of "secular humanism," but this strategy has been a failure. n167 When the government prefers secular ideas to religious ideas, it does not violate the Establishment Clause, no matter how strong the "message of disapproval."

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n166 See note 9.

n167 See Smith v Bd. of School Comm'rs of Mobile County, 655 F Supp 939, 960-71, 980-83 (S D Ala 1987) (summarizing and adopting testimony and argument purporting to show that the public school curriculum was infused with the tenets of the "religion" of secular humanism), rev'd, 827 F2d 684 (11th Cir 1987). For a balanced introduction to the "secular humanism" controversy, see James Davison Hunter, Religious Freedom and the Challenge of Modern Pluralism, in James Davison Hunter and Os Guiness, eds, Articles of Faith, Articles of Peace 54 (Brookings, 1990).

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The appearance of disapproval more plausibly violates the Free Exercise Clause. But plaintiffs who assert free exercise claims based on disapproval run afoul of the requirement that they identify a specific "burden" on their practice of religion. n168 In Mozert v Hawkins County Board of Education, parents of children in the public schools of Hawkins County, Tennessee, contended that particular textbooks, read as a whole, denigrated their religion. n169 They asked that their children be permitted to use substitute texts. n170 The Sixth Circuit rejected this claim on the ground that [*153] enforced exposure to contrary views does not violate the Free Exercise Clause. n171 "What is absent from this case," according to the Sixth Circuit, "is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion." n172 If enforced exposure to materials denigrating one's religion does not communicate a "message of disapproval," I cannot imagine what would.

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n168 See Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv L Rev 933 (1989); David C. Williams and Susan H. Williams, Volitionalism and Religious Liberty, 76 Cornell L Rev 769, 798-850 (1991).

n169 827 F2d 1058 (6th Cir 1987).

n170 Id at 1060.

n171 Id at 1063-65 (emphasizing that plaintiffs' objection was to the children's "exposure" to the objectionable materials).

n172 Id at 1069.

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This result is in obvious contrast to the nativity scene cases, in which the Court has recognized a constitutional claim against being exposed to a government message supporting another religion, even when the claimant could easily avoid the exposure. Why is compelled exposure to governmental messages denigrating one's religion constitutional, while avoidable exposure to governmental messages favorable to another religion is not?

Justice O'Connor best illustrates this asymmetry in her application of her own test. In Lyng, the free exercise claimants, a small Native American religious minority, complained of governmental actions that were "deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment." n173 One might have expected Justice O'Connor to express concern that the government's destruction of holy sites would communicate the "message" that these members of a religious minority were "not full members of the political community." Instead, she maintained that the believers would have a free exercise claim only if they were "coerced by the Government's action into violating their religious beliefs." n174 "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs." n175 It is very odd that Justice O'Connor considers the "coercion" test so inadequate when the messages conveyed by public programs are favorable to religion, but embraces the "coercion" test when the messages are offensive to religion. Evidently, the government is free to disparage, but not to speak favorably of, religion. n176

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n173 Lyng, 485 US at 452. See notes 56-61 and accompanying text for a fuller discussion of the facts of the case.

n174 Id at 449.

n175 Id at 452.

n176 Justice O'Connor and some commentators have attempted to make a virtue of this inconsistency, arguing that "[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." Allegheny, 492 US at 628 (O'Connor concurring). Accord Laycock, 27 Wm & Mary L Rev at 922 (cited in note 142); Sullivan, 59 U Chi L Rev at 205 (cited in note 5). But properly undestood, the two clauses are symmetrical and complementary -- not redundant. The Establishment Clause is about the use of governmental power in favor of religion (either a particular religion or religion in general), and the Free Exercise Clause is about the use of governmental power against religion (either a particular religion or religion in general). There is no persuasive reason to limit one form of interference with religious liberty to coercion while expanding the other to endorsement. The effect of limiting establishment to cases involving coercion may appear to be "redundant" only because of the close relation between the Religion Clauses. Disadvantaging one religion tends to

support the rest -- and thus could be described as an establishment. See Larson, 456 US at 228. Advantaging one religion tends to disadvantage the rest -- and thus could be described as a violation of free exercise. See Hernandez, 490 US at 680. In that sense, either clause could be said to be a redundancy. But this "redundancy" only points out the essential unit of the two Religion Clauses, and no more justifies an asymmetrical expansion of the Establishment Clause than it does an asymmetrical expansion of the Free Exercise Clause.

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[*154] d) The bias among religions. The endorsement test also has an implicit bias in favor of some religions and against others. Messages affirming mainstream religion (and especially "nonsectarian" theism) are likely to be familiar and to seem inconsequential. As Justice O'Connor has interpreted her approach, if a practice is "longstanding" and "nonsectarian," it is unlikely to "convey a message of endorsement of particular religious beliefs." n177 In our culture, most "longstanding" symbols are those associated with Protestant Christianity, and those most likely to be perceived as "nonsectarian" are symbols associated with liberal Protestantism, symbols common to the Jewish and Christian faiths, or symbols incorporating vague references to an unidentified deity. n178 Even so sensitive an observer as Justice Brennan has suggested that governmental religious symbols might be permissible if they are "non-denominational" or if they represent "ceremonial deism." n179 Brennan's suggestion looks very much like endorsement of a civil religion, something serious religionists of all faiths should find deeply troubling.

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n177 Allegheny, 492 US at 630-31 (O'Connor concurring).

n178 The term "nonsectarian" has a long history as a euphemism for liberal Protestantism, in contradistinction to Roman Catholicism and evangelical Christianity. See McConnell, 1991 U Chi Legal F at 138 (cited in note 33).

n179 Lynch, 465 US at 700, 716 (Brennan dissenting). Justice Brennan has stated that "[s]hould government choose to incorporate some arguably religious element into its public ceremonies, that acknowledgement must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion." Id at 714. I am not sure what this means, if it means anything at all.

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e) The lack of historical support. Finally, though I will not elaborate the point here, the endorsement test has no support in the history of the Religion Clauses. The generation that adopted the First Amendment viewed some form of governmental compulsion [*155] as the essence of an establishment of religion. n180 The religious freedom provision of the Virginia Declaration of Rights, long recognized as the precursor to the First Amendment, began with the statement that religion "can be directed only by reason and conviction, not by force or violence." n181 Jefferson argued against the "error" that the "operations of the mind . . . are subject to the coercion of the laws," n182 and Madison denounced "attempts to enforce [religious obligations] by legal sanction." n183 The early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways,

without favoring one sect over another. Consider, for example, the resolution of the First Congress requesting the President to "recommend to the people" a day of thanksgiving and prayer; n184 or the scheduling of divine services following the inauguration of President Washington. n185 If noncoercive messages of endorsement raise a constitutional issue at all, they only do so at the fringes of the constitutional principle. The Religion Clauses were not directed against the evil of perceived messages, but of government power. Justice O'Connor's position that endorsement is the "most direct" infringement of the Establishment Clause is without support in history.

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n180 See Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm & Mary L Rev 933 (1986).

n181 Virginia Declaration of Rights, @ 16 (1776), reprinted in Philip B. Kurland and Ralph Lerner, eds, 5 The Founders' Constitution 70 (Chicago, 1987).

n182 Thomas Jefferson, Notes on the State of Virginia, Query 17 (1784), reprinted in id at 79.

n183 James Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in Everson, 330 US at 70.

n184 Stokes and Pfeffer, Church and State in the United States at 87 (cited in note 35).

n185 Id.

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f) Suggestions for improvement. The indeterminacies of the endorsement test would not be so serious if it were recognized only as an approach to a specific problem: evaluating government action where the only effect on religion is symbolic. In this context, all clear tests sometimes produce wrong results, and all tests that provide tolerable results are irremediably unclear. The endorsement test is more harmful when it is applied to government action that has real, nonsymbolic consequences. There, focusing on the appearance of endorsement only distracts from attention to the real effects of the government action.

[*156] Even within the context of government symbols, the endorsement test suffers because it fails to distinguish between two quite different formulations. The most common formulation of the endorsement test asks, in the abstract, whether the government's message will be perceived as endorsing or disapproving religion. n186 But another formulation is that "[t]he endorsement test . . . preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." n187 The difference between these two formulations is important whenever the government "endorses" religion along with many other institutions or ideologies. It would be one thing for Illinois to declare Mormonism the official religion of the state, thus ranking it above the others; it would be another thing for Illinois to honor the accomplishments of the Mormons by creating a public monument in Nauvoo, Illinois. n188 Such a monument would not reflect negatively on the value of other religions.

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n186 Lynch, 465 US at 687-89 (O'Connor concurring).

n187 Jaffree, 472 US at 70 (O'Connor concurring). The problem is that Justice O'Connor and other advocates of the endorsement test have not distinguished between these formulations; instead, they have treated them as interchangeable. Compare id at 69 with id at 70. See also Allegheny, 492 US at 593-94 (Blackmun) (claiming that concepts of "endorsement" and "favoritism" are the same). This lack of distinction makes application of the endorsement test, even if confined to the domain of government speech, inconsistent and potentially destructive. A consistent reformulation of the endorsement test in terms of favoritism or preference would closely resemble the position of Professor Douglas Laycock, who terms the approach "substantive neutrality." Laycock, 39 DePaul L Rev 993 (cited in note 162).

n188 Nauvoo, Illinois, once the largest and fastest-growing city in Illinois, was founded by Joseph Smith in 1840 and was the center of Mormonism in the country. Sydney Ahlstrom, A Religious History of the American People 506 (Yale, 1972).

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The latter formulation of the endorsement test is better. The target of the endorsement test should be favoritism or preference, not endorsement. The "equal access" controversy illustrates why. The issue was whether public high schools could constitutionally permit religious student clubs to meet on their premises on the same conditions as other extracurricular student clubs. A typical condition was that a club must "contribute to the intellectual, physical or social development of the students and [be] otherwise considered legal and constitutionally proper." n189 Under the usual formulation of the endorsement test, a school could not constitutionally allow a religious club to meet under this condition, because to do so would convey the school's official opinion that the religious club would "contribute to the intellectual, physical or social development" of the students. That is an endorsement. But under [*157] the "favoritism" or "preference" formulation, allowing equal access would be constitutional since it would not "prefer" religion or any particular religion over the alternatives. n190

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n189 Bender v Williamsport Area School Dist., 741 F2d 538, 544 (3d Cir 1984), vacated, 475 US 534 (1986) (italics and footnote omitted).

n190 For a more difficult example, see Pub L 102-14, 105 Stat 44 (1991). This statute recites (among other things) that the seven Noahide Laws (principles from the Hebrew Bible treated in the Jewish tradition as binding on righteous Gentiles as well as Jews) "have been the bedrock of society from the dawn of civilization"; that "the citizens of this Nation [must not] lose sight of their responsibility to transmit these historical ethical values from our distinguished past to the generations of the future"; that "the Lubavitch movement has fostered and promoted these ethical values and principles throughout the world"; and that "Rabbi Menachem Schneerson, leader of the Lubavitch movement, is universally respected and revered."

Viewed by itself, this statute is an "endorsement" of a particular religion if ever there was one. But in the context of the hundreds of celebratory joint resolutions passed by Congress every year which "endorse" any number of individuals, groups, ideas, and things, who would say that the government has communicated a message that the Lubavitchers are "preferred" over everyone else? The statute is more like the monument in Nauvoo. I am grateful to Robert Katz for bringing this example to my attention.

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Moreover, a "favoritism" or "preference" test would enjoy the historical support that the pure "endorsement" test so conspicuously lacks. The supporters of constitutional protections for religious freedom were insistent that sect equality is an indispensable element of that freedom. n191 To be sure, their principal focus was on differences in material treatment, but it is no great stretch to extend the principle to lesser evils. n192 In this connection, it may be significant that the South Carolina Constitution of 1778 expressly "establishes" the religion of Protestant Christianity, but without any mention of material benefits other than the privilege of incorporation. This theory, however, provides no warrant for individuating government action that merely conveys a message favorable to religion, unless the context is one of actual favoritism or preference.

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n191 For a summary of the evidence, see McConnell, 57 U Chi L Rev at 1130-32 (cited in note 107).

n192 SC Const of 1778, Art XXXVIII, reprinted in Benjamin Perley Poore, ed, 2 Federal and State Constitutions Colonial Charter, and Other Organic Laws of the United States 16-26 (GPO, 2d ed 1878). The example is not conclusive; one suspects that the provision was understood to authorize legislation providing material benefits, as was the case in neighboring Georgia. Ga Const of 1777, Art LVI, reprinted in Poore, ed, 1 Federal and State Constitutions 383 (implying that the legislature has the power to require citizens to contribute to religious teachers "of their own profession").

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5. The coercion test.

Another candidate to replace the Lemon test is the "coercion test," which has been proposed by Justices Kennedy, White, and [*158] Scalia, and Chief Justice Rehnquist, n193 and embraced by the Solicitor General in a case before the Supreme Court this Term. n194 As explained by Justice Kennedy, the Establishment Clause contains "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" n195 This approach has the considerable virtue of returning to the historical purposes of the Establishment Clause, and it would redirect attention toward the actual effects of governmental power, rather than toward mere appearances. Perhaps more importantly, it would restore the symmetry between the Religion Clauses that was broken when the Court declared that coercion was an element of the violation of the Free Exercise Clause but not of the Establishment Clause.

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n193 Allegheny, 492 US at 659-62 (Kennedy, joined by Rehnquist, Scalia, and White, concurring in part and dissenting in part).

n194 Brief for the United States as amicus curiae, Lee v Weisman, No 90-1014, 15-19.

n195 Allegheny, 492 US at 659 (Kennedy concurring in part and dissenting in part) (quoting Lynch, 465 US at 678).

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One of the first articles I wrote on the Religion Clauses criticized the Court for its unexplained dicta that coercion was not an element of an establishment violation. n196 I therefore take some satisfaction in seeing renewed interest in coercion as an aspect of the establishment analysis. But if I had it to do over again, I would take pains to emphasize that the concept of "coercion" cannot, in itself, supply a standard for distinguishing between establishments and nonestablishments, and that it is vital to understand the concept of coercion broadly and realistically. For example, the Court is now being urged to adopt the coercion test in a case involving a public prayer at a junior high school graduation ceremony. n197 I would have thought that gathering a captive audience is a classic example of coercion; participation is hardly voluntary if the cost of avoiding the prayer is to miss one's graduation. n198 Equally seriously, it appears that the content of the prayer was subject to indirect governmental control, which is a species of coercion. n199 For the [*159] Court to embrace the coercion test in this form would be a small step back toward permitting the government to indoctrinate children in the favored civil religion of nondenominational theism. n200

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n196 McConnell, 27 Wm & Mary L Rev 933 (cited in note 180).

n197 Weisman v Lee, 908 F2d 1090 (1st Cir 1990), cert granted, 111 S Ct 1305 (1990).

n198 In defense of the invocation, one could argue that students could avoid participating in the prayer by simply ignoring it (respectfully). This argument may be more persuasive for adults.

n199 Although the clergyman delivering the invocation composed his own prayer, the school officials presented him a copy of guidelines for public prayer prepared by the National Conference of Christians and Jews and advised him that his prayer should be "nonsectarian." Weisman v Lee, 728 F Supp 68, 69 (D RI 1990). It is not likely that a school would select a clergyman who would depart significantly from these guidelines.

n200 A possible example of a noncoercive event is the separate baccalaureate service which some school systems sponsor. Not only can this event be genuinely noncoercive, but by allowing a number of different faiths and denominations to participate, it can avoid the pitfalls of civil religion. The analysis would be different if the school acted in such a way as to create a stigma for

non-participation.

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But it is too soon to tell how the Rehnquist Court will interpret the coercion test, or even if it will adopt the test. At this point, I am merely warning that an emphasis on coercion could tend toward acquiescence in more subtle forms of governmental power. It is one thing to say that the mere annoyance from seeing the government associate itself with a message of which one disapproves does not violate one's constitutional rights. It is something else to say that government pressure to conform to majoritarian beliefs does not give rise to a constitutional claim because the fist of coercion has been replaced by the subtle pressures and influences of the welfare-regulatory state. If interpreted strictly, the coercion test would increase the power and discretion of majoritarian institutions over matters of religion.

The concept of coercion is based on the distinction between persuasion and force. If a missionary comes to my door to proselytize, I might say that his actions are impertinent or annoying, but I would not say that they were coercive. In the marketplace of ideas, the consumer is assumed to be free. A strict version of the coercion test would apply the same understanding to governmental speech. John Locke, for example, maintained that the government's latitude to use persuasion in matters of religion is no more constricted than the private citizen's:

It may indeed be alleged, that the magistrate may make use of arguments, and thereby draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. In teaching, instructing, and redressing the erroneous by reason, he may certainly do what becomes any good man to do. . . . But it is one thing to persuade, another to command; one thing to press with arguments, another with penalties. n201

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n201 John Locke, A Letter Concerning Toleration, in Locke, 5 The Works of John Locke 11 (Baldwin, 12th ed 1824). John Locke was enormously influential on the Americans' concept of religious liberty, especially on Jefferson's. See McConnell, 103 Harv L Rev at 1430-35 (cited in note 100). In the absence of conflicting evidence, it might be reasonable to impute Locke's understanding to the Framers. But see id at 1443-49 (suggesting why the dominant understanding of religious freedom in America at the time of the adoption of the First Amendment may have been broader than Locke's).

Locke's language may lead some modern readers to think he is talking of the government official's right to speak in his private capacity (for example, a president referring to God in a speech). But in context it is plain that by "magistrate" Locke meant government -- not the government official. See John Locke, The Second Treatise of Government ch 18, P208, in Locke, Two Treatises of Government 307, 452 (Mentor, 1960).

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[*160] Justice Kennedy explicitly rejects this Lockean position. He has stated that by "coercion" he does not mean "direct coercion in the classic sense of an establishment of religion that the Framers knew." n202 But having

rejected the strict version of coercion, which produces results that are relatively clear but wrong, he must supply an alternative definition.

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n202 Allegheny, 492 US at 661 (Kennedy concurring in part and dissenting in part) (emphasis in original). Kennedy's originalist interpretation seems to unravel here. If we depart from coercion "in the classic sense of an establishment of religion that the Framers knew," why invoke the Framers' view that coercion was an element of establishment? To be complete, Kennedy's argument requires an intermediate step that translates the Framers' conception of coercion into a conception that is true to their purposes but usable today.

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There are three ways in which Kennedy's conception of coercion seems to differ from the strict interpretation. The first is that he would include within the definition "indirect" as well as "direct" coercion. n203 ("Direct" coercion is government action that forbids or compels certain behavior; "indirect" coercion is government action that merely makes noncompliance more difficult or expensive.) It took many years for the Supreme Court to recognize that so-called "indirect" burdens on the free exercise of religion, such as denying unemployment compensation benefits for claimants who refuse to accept employment for religious reasons, are unconstitutional. n204 This development was one manifestation of the decline of the right-privilege distinction in constitutional law generally. n205 Justice Kennedy's statement that the Establishment Clause is not limited to "direct coercion" suggests that he does not intend to resurrect the right-privilege distinction under the Establishment Clause. Evidently he agrees that the doctrine of unconstitutional conditions, in some form, should continue to apply to the Establishment Clause.

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n203 Id.

n204 The shift came in Sherbert v Verner, 374 US 398 (1963) (Free Exercise Clause required South Carolina to give unemployment benefits to Seventh Day Adventists who refused to work on sabbath).

n205 See William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv L Rev 1439 (1968).

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[*161] The second way in which Justice Kennedy's conception of coercion expands upon the classic conception is that it does not forbid all aid to religion using tax-generated resources. n206 In this respect, the milder version of the coercion test gives more latitude to government action than the strict test. This seems right. There is coercion when the government taxes a citizen and uses the money to support a religious ministry. But when the government is funding a broad array of nonprofit social welfare organizations, secular as well as religious, the courts should not conclude that funding a religious social welfare ministry on equal terms is an establishment of religion, even though the coercion of the taxpayer is identical. The concept of coercion is simply not enough to distinguish between permitted and forbidden uses of tax resources.

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n206 See Kendrick, 487 US at 624 (Kennedy concurring).

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While ruling out the extreme "no-aid" position, however, Justice Kennedy has supplied no alternative standard. He says, unhelpfully, that the Establishment Clause does not allow the government to "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" n207 This leaves unanswered under what circumstances forms of government "benefit" or "tend" to establish a state religion. Indeed, Kennedy's statement implies that this is a question of "degree," turning on the amount of the aid, rather than a question of kind, turning on the structure of incentives created by government action. That cannot be right. Tax exemptions are worth billions of dollars, and do not violate the Establishment Clause so long as they do not favor religious over nonreligious charities. Yet a $ 100 grant to a church for hiring the minister would almost certainly violate the Establishment Clause. Madison nipped this argument in the bud when he observed that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." n208

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n207 Allegheny, 492 US at 659 (Kennedy concurring in part and dissenting in part) (brackets in original) (quoting Lynch, 465 US at 678). Does establishment encompass "indirect" coercion but only "direct" benefits? The Supreme Court in past establishment cases has been shamelessly inconsistent in its use of the terms "direct" and "indirect." See Michael W. McConnell, Political and Religious Disestablishment, 1986 BYU L Rev 405, 424 n 62. I hope that Justice Kennedy does not embark on a journey back into the morass.

n208 James Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in Everson, 330 US at 63, 65-66.

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Finally, in the sharpest break from the classic conception of coercion, Justice Kennedy maintains that "[s]peech may coerce in [*162] some circumstances." n209 He explains that "[s]ymbolic recognition or accommodation of religious faith may violate the Clause in an extreme case," n210 and goes on to say that he would forbid symbolic government actions that "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." n211 This conclusion may be correct, but it has no logical connection to the coercion test. Speech is a necessary part of the coercion process; but as Locke argued, pure speech is not coercive, unless it is coupled with other interferences with liberty. n212

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n209 Allegheny, 492 US at 661 (Kennedy concurring in part and dissenting in part).

n210 Id.

n211 Id.

n212 See text accompanying note 201.

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I agree that Locke was wrong to allow the government to promote orthodoxy through speech, but the weakness in Locke's position is not that speech is "coercive." The problem is that Locke overlooks crucial distinctions between governmental and private activity: First, that the state has far superior means by which to advocate its view of spiritual truth, which are not "in common with other men"; second, that those means are supplied by the citizens through other coercive powers including taxation, thus enabling the state, unlike the private citizen, to press its views on religion with the wherewithal of dissenters; n213 and third, that the state is limited to performing those functions authorized by the people, and there is no reason to suppose that a religiously pluralistic people -- especially a religiously serious pluralistic people -- would entrust the function of religious instruction to political authorities. For these reasons, Justice Kennedy is on solid ground in arguing that our government does not have free rein to proselytize.

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n213 I do not mean to imply that government speech always has these properties. Sometimes the means used by the government are similar to the means available to all citizens and sometimes the government speaks without marginal cost that must be borne by the taxpayers. In these instances, the argument against government speech is much weaker. For example, a state university press, which is otherwise indistinguishable from many private publishers, should be treated as a private speaker for Establishment Clause purposes.

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After Kennedy has made this concession, however, scant difference remains between his coercion-proselytization test and O'Connor's endorsement test (at least if the latter is given its "favoritism" interpretation). To be sure, in Allegheny, the creche-menorah case, the two Justices reached somewhat different conclusions with their dueling standards. n214 But the differences in result [*163] had nothing to do with the differences in legal standard. O'Connor and Kennedy simply perceived the symbols in different ways.

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n214 Allegheny, 492 US 626-27 (O'Connor concurring), 664-65 (Kennedy concurring in part and dissenting in part). Compare Mergens, 110 S Ct 2356, in which the two Justices also applied their competing standards but reached the same conclusion.

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Justice Kennedy began with the proposition that the government may participate in celebrations of religious holidays by "installing or permitting festive displays" n215 of some sort. While this proposition might well be

challenged on a theoretical level (indeed, academics who oppose religious holiday displays typically reject it), all nine Justices seem to take this as a starting point, disagreeing only about whether specifically religious symbols may be included. Kennedy then reasoned that

[if] government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would . . . signal not neutrality but a pervasive intent to insulate government from all things religious. n216 This argument, as I understand it, does not focus on the lack of coercion, but on the meaning of neutrality in the context of a mixed religious-secular holiday.

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n215 Allegheny, 492 US at 663 (Kennedy concurring in part and dissenting in part).

n216 Id at 663-64.

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Justice Kennedy's implied baseline for evaluating the neutrality of the display is the way in which the holiday is celebrated in the private sphere, presumably untainted by governmental involvement. There, we find a mixture of religious and nonreligious elements, nativity scenes as well as Santa Clauses. Implicitly, Kennedy suggests that a wholly secular governmental display would deviate from this baseline by emphasizing secular elements and extirpating religious elements. Secularism is not neutrality. n217

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n217 See text accompanying notes 320-27 for a further discussion of this point.

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Justice O'Connor, while disapproving the nativity scene, voted to uphold the menorah. She explained that "[a] reasonable observer would . . . appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or non-belief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." n218 Her position is not incompatible with Justice Kennedy's, since both recognize that religious symbols do not always have the effect of excluding or stigmatizing nonadherents; in some contexts they can "send [] a message of pluralism and freedom to choose one's own beliefs," to use Justice [*164] O'Connor's words. n219 A menorah on public property during the Hannukah season has much the same symbolic impact as a festival on Mexican Independence Day, a parade on St. Patrick's Day, or a solemn memorial on Martin Luther King's birthday. These displays could be seen as exclusionary by non-Mexicans, non-Irish, and non-African Americans, but they are not. These celebrations affirm that those whose symbols are displayed are a welcome and important part of the heritage of this pluralistic land, without implying that others are any less welcome or important.

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n218 Allegheny, 492 US at 635-36 (O'Connor concurring).

n219 Id at 634.

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Justice O'Connor's defense of the menorah display suggests, in common with Justice Kennedy's analysis of the nativity scene, that under some circumstances the inclusion of religious elements is actually preferable to a wholly secular display, since a secular display could not communicate the message of "tolerance of different choices in matters of religious belief." n220 Just as Kennedy implicitly took issue with the proposition that secularism is equivalent to neutrality, O'Connor implicitly recognized that secularism is not equivalent to pluralism.

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n220 Id at 636.

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If there is a difference between the Justices, it seems that O'Connor is more concerned about neutrality among different religions, n221 while Kennedy is more concerned about neutrality between religion and nonreligion. As to that difference, a combination of their perspectives would be better than either view alone. The key issue is the social function that the challenged symbol serves in the life of the community. If the function is to promote a particular view by stigmatizing or excluding nonadherents, neither Kennedy nor O'Connor would permit the symbol. If the function is simply one of celebration, and if all significant elements in the community, including other religions, are welcome to use public property for appropriate celebrations of their own, both Kennedy and O'Connor would permit it.

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n221 See id at 627-28 (criticizing Justice Kennedy's coercion test on the ground that it "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs").

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To be sure, the coercion test (in contrast to the endorsement test) will eliminate claims by persons whose only complaint is that the government action irritates or offends them; being irritated is not the same as being influenced ("proselytized") by government action. Thus the coercion test is slightly narrower than the endorsement test. But the coercion test would treat such claims [*165] under the Establishment Clause like claims of stigmatic injury under other provisions of the Constitution. Racial minorities who allege that they have been stigmatized by government action (but who suffer no other injury) cannot sue under the Equal Protection Clause; n222 religious individuals who allege that their faith has been denigrated by government action have no claim under the Free Exercise Clause. n223 Indeed, the general rule is that plaintiffs who suffer no personal injury "other than the psychological consequence

presumably produced by observation of conduct with which one disagrees" lack standing to sue. n224 Justice O'Connor's explanation that citizens of a religious persuasion other than that endorsed by the government would perceive that they are "not full members of the political community" n225 applies with equal strength to equal protection and free exercise claims, but the Court has recognized that the costs of recognizing such claims outweigh the benefit. n226 There is no evident reason to treat establishment claims with greater solicitude.

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n222 See Allen v Wright, 468 US 737, 755 (1984); Moose Lodge No. 107 v Irvis, 407 US 163, 166 (1972).

n223 The requirement of a "burden" on the practice of religion as a predicate to a free exercise claim eliminates mere complaints of psychological discomfort. See text accompanying notes 67-70.

n224 Valley Forge College v Americans United, 454 US 464, 485 (1982).

n225 Lynch, 465 US at 688 (O'Connor concurring).

n226 Interestingly, Justice O'Connor authored opinions rejecting claims of stigmatic injury in those contexts. Allen, 468 US 737; Lyng, 485 US 439.

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Perhaps the most serious objection to both the coercion and the endorsement test is that they address cases of symbolic action only. Neither test provides reliable guidance for the vastly more important cases in which government action actually affects the practice of religion: cases involving government funding of social welfare and educational activities of religious and nonreligious private organizations; exceptions from generally applicable laws and other forms of accommodation of the religious needs of individuals and institutions; threats to the autonomy of religious organizations with respect to their structure, leadership, and members; discriminatory treatment of minority religions by regulators and common law courts; and so forth. The coercion test is useless in these cases, because they all involve government coercion of some sort. To the extent that the endorsement and coercion tests overemphasize the symbolic cases, they retard understanding and postpone doctrinal reform. The Lemon test is a serious problem, but not for reasons addressed by either of these most prominent alternatives.

[*166] 6. Establishment implications of Smith.

The Rehnquist Court, with its respect for legal formalism, is unlikely to repeat the Warren and Burger Courts' mistake of reading the Religion Clauses as inconsistent principles, n227 especially since the author of Smith, Justice Scalia, is the most systematic thinker on the Court. Scalia is not likely to remain content with a jurisprudence in which the Court, in his words, has "not yet come close to reconciling Lemon and our Free Exercise cases." n228 Since Smith now represents the Court's interpretation of the Free Exercise Clause, it is to be expected that the Court will soon reinterpret the Establishment Clause in a manner consistent with Smith. What would that be?

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n227 See Section I.

n228 Edwards, 482 US at 617 (Scalia dissenting).

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The most logical step would be to read both clauses as embodying a formal neutrality toward religion. Under Smith, the Free Exercise Clause precludes government action that is "directed at," or "singles out," religion for unfavorable treatment. The Establishment Clause analog would be to preclude government action that singles out religion for favorable treatment. This position has long been advocated by Justice Scalia's sometime University of Chicago colleague, Philip Kurland. Kurland contends that the two Religion Clauses should be "read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden." n229 Until 1990, the Supreme Court had rejected this position as to both Clauses. In Smith, the Court adopted this position as to the Free Exercise Clause. Perhaps its extension to the Establishment Clause will be the next shoe to drop.

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n229 Philip B. Kurland, Religion and the Law 18 (Aldine, 1962); Philip B. Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill L Rev 3, 24 (1978). This position has recently been revived by Professor Mark Tushnet. See Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 S Ct Rev 373.

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Logical though this move might be, it is highly unlikely. The formal neutrality position would make unconstitutional all legislation that explicitly exempts religious institutions or individuals from generally applicable burdens or obligations. Yet the theory of Smith is that exemptions are a form of beneficent legislation, left to the discretion of the political branches. The problem with requiring exemptions under the Free Exercise Clause is not that exemptions [*167] violate the principle of neutrality, but that enforcement under the Constitution would give judges too much discretion: "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." n230 Noting that "a number of States have made an exception to their drug laws for sacramental peyote use," n231 the Court commented: "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." n232

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n230 Smith, 110 S Ct at 1606 n 5.

n231 Id at 1606.

n232 Id.

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Smith thus rejects the formal neutrality position under the Establishment Clause. This is not surprising. One of the positive developments in the Supreme Court over the past ten years has been its growing acceptance of the legitimacy of accommodation of religion. The Court has accepted special treatment of religion where it facilitates the free exercise of religion, even if it is not constitutionally compelled under the Free Exercise Clause. n233 The conservatives on the Court have been the most enthusiastic supporters of this development. It would be most peculiar if the conservative wing of the Court were to repudiate the doctrine of accommodation now that it has achieved wide acceptance.

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n233 See Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, (Geo Wash L Rev, forthcoming 1992).

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If Smith does not augur adoption of the formal neutrality interpretation, what does it mean for the Establishment Clause? The answer is not obvious. Other than his suggestion to eliminate the purpose prong of the Lemon test, Justice Scalia has not set forth a comprehensive theory of the Establishment Clause, even in his numerous separate dissents and concurrences. But while Scalia has not offered a comprehensive theory, his opinions do show a clear pattern. In each of them, Scalia suggests a modification of the Lemon test that is one step more deferential to the government than the Lemon test requires. In Edwards, he proposed eliminating the purpose prong. n234 In Kendrick, he joined an opinion by Justice Kennedy suggesting elimination of the rule that direct government funding may not go to pervasively sectarian organizations. n235 In Texas Monthly, he argued that tax exemptions could be skewed in favor of religious organizations. n236 In each case, he [*168] left in place the often unprincipled doctrinal categories of the Lemon test, modifying them only to the extent of easing the standard. n237 This pattern suggests that Justice Scalia is more concerned about cabining the judicial role in cases involving religion than in developing a comprehensive substantive theory.

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n234 See notes 129-32 and accompanying text.

n235 Kendrick, 487 US at 624-25 (Kennedy concurring).

n236 Texas Monthly, 489 US at 29-44 (Scalia dissenting).

n237 The ensuing doctrinal confusion is especially conspicuous in Kendrick, in which Justices Scalia and Kennedy joined Chief Justice Rehnquist's opinion for a five-Justice majority. There the Court rejected a facial challenge to the Adolescent Family Life Act under the effects and entanglement prongs of the Lemon test, on the ground that the religiously affiliated grant recipients had not been found to be "pervasively sectarian." Kendrick, 487 US at 612 (effects), 616 (entanglement). This was what distinguished Kendrick from cases like

Grand Rapids and Aguilar. But in their concurring opinion, Scalia and Kennedy argued that the "juridicial category" of "pervasively sectarian institutions" was not "well-founded." Id at 624. Thus, they vitiated the doctrinal argument for the majority, without substituting another.

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But as discussed above, deference to majoritarian decisionmaking is out of keeping with the spirit of the Religion Clauses. The great danger of revising Establishment Clause doctrine in light of Smith is replicating Smith's vices of excessive deference to governmental decisionmaking and bias in favor of mainstream religion. These vices may be preferable to the secularist bias of the Warren and Burger Courts, but not by much.

III. A RELIGION CLAUSE JURISPRUDENCE FOR A PLURALISTIC NATION

A jurisprudence of the Religion Clauses must begin with a proper understanding of the ideals of the Clauses and the evils against which they are directed. We can then formulate legal doctrine. The great mistake of the Warren and Burger Courts was to embrace the ideal of the secular state, with its corresponding tendencies toward indifference or hostility to religion. The mistake of the emerging jurisprudence of the Rehnquist Court is to defer to majoritarian decisionmaking. A better understanding of the ideal of the Religion Clauses, both normatively and historically, is that they guarantee a pluralistic republic in which citizens are free to exercise their religious differences without hindrance from the state (unless necessary to important purposes of civil government), whether that hindrance is for or against religion.

The great evil against which the Religion Clauses are directed is government-induced homogeneity -- the tendency of government action to discourage or suppress the expression of differences in matters of religion. As Madison explained to the First Congress, "the people feared one sect might obtain a preeminence, or two [*169] combine together, and establish a religion to which they would compel others to conform." n238 As such authorities of the day as Thomas Jefferson and Adam Smith argued, government-enforced uniformity in religion produced both "indolence" within the church and oppression outside the church. n239 Diversity allows each religion to "flourish according to the zeal of its adherents and the appeal of its dogma," n240 without creating the danger that any particular religion will dominate the others. At some times in our history, and even in some isolated regions of the country today, the great threat to religious pluralism has been a triumphalist majority religion. The more serious threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs. This translates into an unwillingness to enforce the Free Exercise Clause when it matters, and a hypertrophic view of the Establishment Clause.

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n238 Speech of James Madison (Aug 15, 1787), in Gales, ed, 1 Annals of Congress at 758 (cited in note 6).

nn39 See Thomas Jefferson, Notes on the State of Virginia, Query 17 at 214-20 (Trenton, 1784); Adam Smith, The Wealth of Nations 622-44 (Ward Lock, 1838).

n240 Zorach v Clausen, 343 US 306, 313 (1952).

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When scrutinizing a law or governmental practice under the Religion Clauses, the courts should ask the following question: is the purpose or probable effect to increase religious uniformity, either by inhibiting religious practice (a Free Exercise Clause violation) or by forcing or inducing a contrary religious practice (an Establishment Clause violation), without sufficient justification? The baseline for these judgments is the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government. The underlying principle is that governmental action should have the minimum possible effect on religion, consistent with achievement of the government's legitimate purposes.

Virtually everything government does has some effect on religion, however indirect. No doctrinal formulation can eliminate the difficult questions of judgment in determining when the government's purpose is sufficiently important, when its chosen means are sufficiently tailored, or when the effect of the action on religious practice is sufficiently minor or indirect. But we can be clear about the ideal toward which a jurisprudence of the Religion Clauses should be directed.

[*170] A. A Pluralist Approach to the Free Exercise Clause

In free exercise cases, the pluralist approach would be something like the approach of the Warren and Burger Courts -- albeit with more vigorous and consistent enforcement. This is not to say that the "compelling interest test" was without problems. The test was excessively abstract and failed to define its key operative concepts. It provided little guidance to legislatures or lower courts about what burdens on religious practice triggered heightened scrutiny, or about how to evaluate the governmental interest. The first requirement for scholarship in this field, should Smith be overturned, is the development of more precise definitions of the elusive concepts of "burden" and "compelling governmental interest." n241

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n241 For more extended discussion of this problem, with tentative g suggestions for its solution, see McConnell, 57 U Chi L Rev at 1141-49 (cited in note 107); Michael W. McConnell and Richard A. Posner, An Economic Approach to Issues of Religious Freedom, 56 U Chi L Rev 1, 38-54 (1989).

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Apart from the question of generally applicable laws, at issue in Smith, there are two other currents of change in free exercise jurisprudence, one from the right and one from the left. From the right comes the movement to resuscitate the right-privilege distinction by limiting the Free Exercise Clause to outright "prohibitions" of religious practice. From the left comes the movement to transform the free exercise right into a right of personal autonomy or self-definition. Both should be confronted and resisted.

1. "Prohibitions" of religious practice and conditions on government aid.

In Lyng, the Court emphasized that the "the crucial word in the constitutional text is 'prohibit.'" n242 From this, the Court concluded that the Free Exercise Clause does not limit how the government controls its property, even when, as in Lyng, the government owns holy sites indispensable for religious worship. n243 Thus the Forest Service could build a road over an American Indian holy site and "virtually destroy" the religion. n244 By the same reasoning, the Free Exercise Clause would not limit the government's exercise of other nonregulatory powers, even if the government's action or inaction made the exercise of religion difficult or impossible. The Free Exercise Clause would apply only when the government [*171] made religious practice unlawful (and even then, under Smith, the Clause would not apply if the prohibition were generally applicable and not directed at religion). Presumably, the government could draft men and women into the Army and send them to distant lands, and then refuse to provide for their religious worship needs; it could incarcerate prisoners without providing chapels or chaplains. The government could require all citizens to pay taxes to support welfare or educational programs, but then condition the benefits from the programs on rules which conflict with religious principles. These would not be "prohibitions" and so would not be coerced.

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n242 Lyng, 485 US at 451.

n243 Id at 451-52.

n244 Id at 451.

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Lyng thus raises the central question surrounding the enforcement of constitutional rights under a welfare state: are the conditions which the government attaches to the use and distribution of resources subject to the same constitutional limitations as direct governmental legislation? Specifically, does the word "prohibit" in the First Amendment limit the Free Exercise Clause to "negative" legislation -- direct prohibitions -- aimed at religion? I am not persuaded that a 1791 audience necessarily would have understood the term "prohibitions" so narrowly; n245 but even if it would have, we cannot fulfill the purposes of the Free Exercise Clause under modern conditions without adapting to the vastly expanded role that government now plays in our lives. Like every other constitutional protection, the Free Exercise Clause should be understood to be violated by unconstitutional conditions as well as by direct restraints. n246

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n245 See McConnell, 103 Harv L Rev at 1486-88 (cited in note 100).

n246 See Richard Epstein, The Supreme Court, 1987 Term -- Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv L Rev 4 (1988); Sullivan, 102 Harv L Rev 1413 (cited in note 94); Unconstitutional Conditions Symposium, 26 San Diego L Rev 175 (1989).

Professor Sullivan's excellent Unconstitutional Conditions article places her in the forefront of the academic movement to recognize the denial of government "benefits" as a form of coercion. She should therefore be in agreement with

my position here, which is simply an application of unconstitutional conditions doctrine to the Religion Clauses. But her substantive commitment to ensuring a "secular public moral order," Sullivan, 59 U Chi L Rev at 198 (cited in note 5), overcomes her commitment to a consistent theory of constitutional rights. She argues that the exercise of religion may be subjected to financial "disincentives," id at 213, even though it may not be directly coerced. It is ironic that Sullivan criticizes both the Supreme Court and me for "head[ing] backward toward an eighteenth-century focus on intentional force and away from a twentieth-century understanding that the state has many subtler but equally effective means for controlling religious incentives." Id at 222. My position is precisely the opposite: I contend that the twentieth-century understanding should be applied in both free exercise and establishment contexts. See notes 193-206 and accompanying text (critcizing the narrow conception of coercion under the Establishment Clause); notes 242-46 and accompanying text (criticizing the narrow conception of prohibition under the Free Exercise Clause). It is Professor Sullivan who advocates a freedom for "religious subcultures to withdraw from regulation" but not to be protected from the discriminatory administration of the welfare state. Sullivan, 59 U Chi L Rev at 222 (cited in note 5). She advocates a twentieth-century constitutionalism for most rights but an eighteenth-century constitutionalism for religion.

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[*172] 2. Free exercise and the rights of conscience.

On the other hand, some would expand the scope of the Free Exercise Clause by treating the free exercise right as a right of personal autonomy or self-definition. Rather than understanding religion as a matter over which we have no control -- the demands of a transcendent authority -- it has become common to regard religion as valuable and important only because it is what we choose. In the words of Justice Stevens, "religious beliefs worthy of respect are the product of free and voluntary choice by the faithful." n247 This treats religion as an individualistic choice rather than as the irresistible conviction of the authority of God. n248

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-n247 Jaffree, 472 US at 53 (footnote omitted).

n248 For a thorough discussion of the Supreme Court's tendency to view religion in terms of choice, see Williams and Williams, 76 Cornell L Rev 769 (cited in note 168). For purposes of the ensuing discussion, I will use the term "God" to denominate the ultimate object of religious devotion, since this is a familiar term. I do not mean to exclude nontheistic religions from the definition of "religion" for purposes of the First Amendment. See Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 Stan L Rev 233 (1989).

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The most obvious manifestation of this shift is the move to extend free exercise protections to any and all claims arising from "conscience," understood as the reflective judgment of the individual. David A. J. Richards perhaps best exemplifies this move: he argues that constitutional protections for religious

freedom are ultimately based on "respect for the person as an independent source of value." n249 Relying on this premise, Richards argues that it is illegitimate to distinguish between the free exercise of religion and the free exercise of any other personal belief or value. Free exercise becomes an undifferentiated right of personal autonomy.

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n249 David A.J. Richards, Toleration and the Constitution 142 (Oxford, 1986).

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This symposium is not the occasion for discussing whether some other provision of the Constitution might protect an undifferentiated right of personal autonomy. But if we are to understand the theory and principle of the Religion Clauses, we must know what differentiates "religion" from everything else. The essence of "religion" is that it acknowledges a normative authority independent of the judgment of the individual or of the society as [*173] a whole. n250 Thus, the Virginia Declaration of Rights defined religion as the "duty which we owe to our Creator, and the manner of discharging it." n251 Madison said that the law protects religious freedom because the duties arising from spiritual authority are "precedent both in order of time and degree of obligation, to the claims of Civil Society." n252 The Free Exercise Clause does not protect autonomy; it protects obligation. n253

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n250 See United States v Macintosh, 283 US 605, 633-34 (1931) (Chief Justice Hughes, joined by Justices Holmes, Brandeis, and Stone, dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.").

There is an interesting and important parallel to the analysis of homosexual rights, reflected in the general shift from the term "sexual preference" to the term "sexual orientation." It used to be thought that sexuality was entitled to constitutional protection because each person should be free to choose the objects of his or her affection. Now it is more often argued that sexuality is entitled to constitutional protection because it is not a choice, but something inherent in the person's nature, which cannot be changed.

n251 Virginia Declaration of Rights of 1776, @ 16, reprinted in Poore, ed, 2 Federal and State Constitutions, 1909 (cited in note 192).

n252 James Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in Everson, 330 US at 64.

n253 The Establishment Clause is more a protection for personal autonomy, since it forbids the government to coerce or induce religious observance whether or not the complainant has religious belief to the contrary. It thus protects the right to choose, without regard to any spiritual obligation. But there is no sentiment among liberal commentators to broaden the definition of "religion" under the Establishment Clause, because this broader definition would disable the government from promoting desirable secular values. See Tribe, American Constitutional Law @ 14-6 at 1185 (cited in note 8). Liberals thus typically treat secular humanism as a "religion" for purposes of free exercise claims

(draft exemption, for example) but not for purposes of establishment claims. See id at 1187-88.

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Of course, the Free Exercise Clause protects religious "choice" in the sense that it recognizes the individual believer as the only legitimate judge of the dictates of conscience; authentic religion may not be coerced by human authority. But the theological concept of "soul liberty," from which this principle derives, is not predicated on any belief in the intrinsic worthiness of individual judgment (which, after the fall and before the acceptance of God's grace, is unregenerate). The concept is based on the view that the relations between God and Man are outside the authority of the state.

Thus, in early challenges to Sunday closing laws under state free exercise clauses, courts consistency rejected claims that it violated the right of conscience for the state to designate Sunday as the day of rest, even though plaintiffs persuasively argued that determining which day is the sabbath is a matter of religious conviction [*174] and conscience. n254 But the same courts distinguished cases in which the plaintiff's own religious doctrine required him to work on Sunday. n255 The distinction is subtle but important: free exercise does not give believers the right to choose for themselves to override the socially-prescribed decision; it allows them to obey spiritual rather than temporal authority.

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n254 See Commonwealth v Wolf, 3 Serg & Rawle 47 (Pa 1817); Specht v Commonwealth, 8 Pa 312 (1848).

n255 Wolf, 3 Serg & Rawle at 50; Specht, 8 Pa at 326. Similarly, the claim in Braunfeld did not rest on the proposition that each individual is entitled to choose whether to work on Sunday, but on the fact that enforced closure on Sunday made it economically infeasible for Saturday sabbatarians to close on Saturday as well, as their religion dictates. Braunfeld, 366 US at 602.

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A modern version of this debate is taking place over the claim of a free exercise right to obtain an abortion. n256 In the Utah case now underway, n257 plaintiffs claim that the decision whether to have an abortion is an issue of religiously-informed conscience, and that the state's prohibition of abortions is therefore a violation of free exercise. But plaintiffs do not allege that the law prevents them from complying with the dictates of their own religious persuasion, since their religions do not purport to lay down any such dictates. The plaintiffs assert the right to choose for themselves as autonomous individuals, not the right to conform their conduct to religious law.

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n256 See, for example, Ronald Dworkin, Unenumerated Rights: Whether and How Roe Should Be Overruled, 59 U Chi L Rev 381, 419 (1992) (arguing that the Free Exercise Clause protects the right to choose an abortion).

n257 Jane L. v Bangerter, 91-C-345 G (D Utah).

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This claim must be distinguished from a claim that, under some circumstances, the pregnant woman's religion requires her to get an abortion. (Orthodox Jews, for example, believe that an abortion is mandatory if necessary to save the mother's life. n258) The latter claim, if sincere, is a legitimate free exercise claim, which the government must accommodate unless it has a sufficiently compelling interest in preventing abortion. n259 The Free Exercise Clause does not protect the freedom of self-determination (with respect to abortion, working on Sunday, or anything else); it does protect the [*175] freedom to act in accordance with the dictates of religion, as the believer understands them.

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n258 David M. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law 275 (Schocken, 1968).

n259 Whether the state's interest in protecting fetal life in cases in which the life of another human being would thereby be threatened is "compelling" is beyond the scope of this Article. On abortion and free exercise more generally, see W. Cole Durham, Jr., Edward McGlynn Gaffney, Douglas Laycock, and Michael W. McConnell. For the Religious Freedom Restoration Act, First Things 42, 43 (Mar 1992).

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B. A Pluralist Approach to the Establishment Clause

A pluralist approach to the Establishment Clause requires more explication, since the Supreme Court has never had a satisfactory Establishment Clause doctrine. The Court's first Establishment Clause case in this century was in 1947, n260 and thereafter the Court fell quickly into the secularist interpretations that I have already criticized, most notably the three-pronged Lemon test. n261 Unlike the Lemon test, a pluralistic approach would not ask whether the purpose or effect of the challenged action is to "advance religion," but whether it is to foster religious uniformity or otherwise distort the process of reaching and practicing religious convictions. A governmental policy that gives free rein to individual decisions (secular and religious) does not offend the Establishment Clause, even if the effect is to increase the number of religious choices. The concern of the Establishment Clause is with governmental actions that constrain individual decisionmaking with respect to religion, by favoring one religion over others, or by favoring religion over nonreligion.

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n260 Everson, 330 US 1.

n261 See Section I.

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The modern welfare-regulatory state wields three forms of power that potentially threaten religious pluralism: the power to regulate religious

institutions and conduct, the power to discriminate in distributing state resources, and control over institutions of culture and education. Each of these powers can, and frequently does, promote homogeneity of all kinds, and especially with regard to religion. Too often, however, the Court has interpreted the Establishment Clause to oppose pluralism rather than to foster it by treating as unconstitutional (1) efforts by the political branches to reduce the degree to which the regulatory power of the state interferes with the practice of religion, (2) decisions to include religious individuals and institutions within public programs on an equal and nondiscriminatory basis, and (3) manifestations of religion within the publicly-controlled cultural and educational sector, even in contexts where competitive secular ideologies are given an equal place. Thus, instead of protecting religious freedom from the incursion of the welfare-regulatory state, the Establishment Clause all too often was interpreted to exacerbate the problem.

[*176] In these areas, the Supreme Court is moving in a generally positive direction, and it may not be long before the Establishment Clause is no longer a serious obstacle to either accommodation of religious exercise or the equal treatment of religious institutions. The precedential roots of this pluralistic approach, however, go back to the later years of the Burger Court, and especially to opinions by Justices Brennan and Powell in three important cases: McDaniel v Paty, n262 Widmar v Vincent, n263 and Witters v Department of Services. n264 In this section, I will discuss those decision and their importance to the development of the pluralist approach. I will then address the ways in which the Establishment Clause impeded solutions to the modern problems of control over religion through regulation, spending, and cultural influence, and describe the prospects for improvement in recent cases.

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n262 435 US 618 (1978).

n263 454 US 263 (1981).

n264 474 US 481 (1985). While these opinions provide a firm and consistent basis for a revised jurisprudence for the Religion Clauses, they failed to gain widespread recognition, in part because Justices Brennan and Powell conspicuously failed to apply the approach in other cases. This gave the impression of confusion and inconsistency rather than of doctrinal advance.

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1. The roots of the pluralist approach: McDaniel, Widmar, and Witters.

a) McDaniel v Paty. In McDaniel, the Court struck down a provision of the Tennessee Constitution that disqualified clergymen from legislative office. n265 The court below had upheld the provision because it would "prevent those most intensely involved in religion from injecting sectarian goals and policies into the lawmaking process, and thus [would] avoid fomenting religious strife or the fusing of church with state affairs." n266 The plurality of the Supreme Court had no difficulty rejecting this theory on the ground that it lacked any "persuasive support." n267

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n265 McDaniel, 435 US at 627-29.

n266 Id at 636 (Brennan concurring).

n267 McDaniel, 435 US at 629.

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Justic Brennan, however, voted to invalidate the exclusion on more interesting and wide-ranging grounds. First, as a doctrinal matter, Justice Brennan maintained that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits" except when it does so "for purposes [*177] of accommodating our traditions of religious liberty." n268 He further explained his idea of "accommodation":

[G]overnment may take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish. n269

Under this conception, the government must be "religion-blind" except when it accommodates religion -- i.e., removes burdens on independently adopted religious practice. Brennan's was the first clear statement of the accommodation principle in any Supreme Court opinion. n270

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n268 Id at 639 (Brennan concurring) (footnote omitted).

n269 Id (footnote omitted).

n270 In Zorach v Clausen, the Court upheld an accommodation of religion in the form of a "released time" program in the public schools. 343 US 306, 311-13 (1952). (A released time program permits public schools to release students during the school day so that they may leave the school grounds and go to religious centers for religious instruction or devotional exercises.) But the opinion did not outline a comprehensive accommodation doctrine.

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Second, the Brennan opinion was noteworthy for its treatment of the role of religion in public life. The Tennessee provision was based on the proposition that religion is an inherently sectarian and divisive influence, which must be radically privatized in order to protect the democratic process. This can be seen as a reflection of the Deweyite philosophy, discussed above, n271 which molded Supreme Court thinking during the Warren and Burger periods and underlay the movement to secularize the public sphere. Its principal doctrinal incarnation was the "political divisiveness" element of the entanglement test. The Court explained in Lemon:

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential

divisiveness of such conflict is a threat to the normal political process. . . . The history of many countries attests to the hazards of religion's intruding into the political arena. n272

Without noting its roots in Lemon, Justice Brennan took sharp issue with this reasoning in McDaniel, stating that it "manifest[ed] [*178] patent hostility toward, not neutrality respecting, religion." n273 He denied that the divisiveness of religious entry into political debate is a "threat" to the democratic process. Rather, he said that "religious ideas, no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide-open,'" reminding his readers that "church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education." n274 Brennan took the view that religious are among the many points of view held by people of the United States, and that all such points of view are entitled to equal respect and an equal place in the public councils. "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." n275 He warned against using the Establishment Clause "as a sword to justify repression of religion or its adherents from any aspect of public life." n276 Brennan thus saw religion not as a threat to pluralism, but as an essential and legitimate part of it.

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n271 See notes 45-51 and accompanying text.

n272 Lemon, 403 US at 622-23 (citations omitted).

n273 McDaniel, 435 US at 636 (Brennan concurring).

n274 Id at 640, 641 n 25.

n275 Id at 641.

n276 Id (footnote omitted).

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b) Widmar v Vincent. In Widmar, a public university banned religious student groups from meeting on campus -- a privilege extended to all other student groups -- on the theory that allowing them to meet would "advance religion" in violation of the Establishment Clause. The university also cited the state constitution's policy of enforcing an even stricter separation of church and state than is required by the federal Constitution. n277 In a sense, the university's policy had some validity: it does advance religion to give religious groups free and convenient meeting space; presumably, universities provide facilities for student groups because this will advance the interchange of ideas at their meetings. But Justice Powell's opinion for the majority of the Court recognized that this understanding of "advancement" would commit the government to a policy of discriminating against religion. Since the "forum is available to a broad class of nonreligious as well as religious speakers," Powell noted, any benefit to religion is purely "incidental." n278 Like Brennan's concurrence in McDaniel, the decision treated religion [*179] as an appropriate and legitimate element in the mix of ideas in American life.

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n277 Widmar, 454 US at 270-72, 275.

n278 Id at 274.

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c) Witters v Department of Services. In Witters, a blind man challenged the refusal of the Washington Department of Services for the Blind to pay for his program of vocational education, to which he was otherwise statutorily entitled. The State contended that to pay for his religious education would violate the Establishment Clause, because his chosen profession was the ministry and his course of study consisted of a degree program at a Bible college. n279 But the Supreme Court unanimously rejected the state's argument. Although the Bible college at which Witters matriculated was a pervasively sectarian institution and many of the courses for which he was registered contained specifically religious content, the Court held that it would not violate the Establishment Clause for the state to pay the bill. n280 Employing reasoning similar to that in Widmar, the opinion for the Court stressed that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients" and "is in no way skewed towards religion." n281 Moreover, the Court noted that the program "creates no financial incentive for students to undertake sectarian education," since the benefits are the same no matter which educational path the student chooses. n282 In short, "the decision to support religious education is made by the individual, not by the State." n283 On the other hand, the opinion for the Court implied that if "any significant portion of the aid expended under the Washington program as a whole [were to] end up flowing to religious education," the program might well be unconstitutional. n284

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n279 Witters, 474 US at 483.

n280 Id at 489.

n281 Id at 487-88 (footnote omitted).

n282 Id at 488.

n283 Id.

n284 Id.

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Justice Powell, however -- in an opinion apparently supported by four other Justices and hence commanding majority support n285 -- argued that the decision should not turn on how many [*180] students choose religious or secular education. According to Powell, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the effects prong of the Lemon test. n286 The difference

between the two opinions is narrow but important. The opinion for the Court in Witters was willing to accept religion as one element in the public culture, on nondiscriminatory terms, but only when religion was an insignificant minority. Justice Powell, by contrast, was concerned only that the terms of the program be "wholly neutral"; n287 it did not matter what choices the recipients made.

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n285 Chief Justice Burger and Justice Rehnquist joined Powell's concurring opinion. Id at 490. Justice O'Connor quoted and endorsed the key passage in Powell's opinion. Id at 493 (O'Connor concurring). Justice White stated that he "agree[s] with most of Justice Powell's concurring opinion with respect to the relevance of Mueller v Allen, to this case," while hinting that he adheres to a still more expansive view of the right of the government to aid private schools. Id at 490 (White concurring) (citation omitted).

n286 Id at 490-91 (Powell concurring).

n287 Neutrality is a subtle and contested idea. For elaborations of this concept of neutrality, see Michael W. McConnell, Neutrality Under The Religion Clauses, 81 Nw U L Rev 146 (1986); Laycock, 39 DePaul L Rev 993 (cited in note 162).

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This line of cases escapes the mistakes of both the emerging Rehnquist Court jurisprudence and that of the Warren and Burger Courts. The decisions did not defer to majoritarian decisionmaking. Indeed, in each of the three cases, the government lost. Justice White's plea in Widmar that the States should "be a good deal freer to formulate policies that affect religion in divergent ways" n288 did not attract a single additional vote. Instead, the decisions uphold the principle -- to use Madison's language -- that religious citizens have "full and equal rights." n289 The opinions also abjure the secularist orientation so common in the other opinions of the Warren and Burger Courts. Whether in the political sphere (Brennan in McDaniel), in the interchange of ideas exemplified by the university (Widmar), or in the area of government financial assistance (Witters), these opinions treat religious perspectives as welcome and legitimate parts of our pluralistic public culture. Although the opinion for the Court in Witters hinted that the government-supported sector must remain predominantly secular, the opinions were unanimous in rejecting the idea that it must be entirely secular. In these opinions, the Justices seem to be moving toward the salutary position that the degree of secularism and of religiosity must be left to the people, not dictated by the Constitution, and not subject to the influence or control of the legislature.

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n288 Widmar, 454 US at 282 (White dissenting).

n289 James Madison (speech of Jun 8, 1789), in Gales, ed, 1 Annals of Congress 451 (cited in note 6).

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[*181] 2. Coping with the regulatory state.

As Justice Brennan recognized in McDaniel, it is sometimes necessary for the government to "take religion into account" in order to ensure that government regulation does not infringe religious freedom. n290 While always true to some extent, this has become far more important as government regulation has penetrated so much more deeply into both private life and the operations of the non-profit sector. As discussed above, the Rehnquist Court's adoption of a formal neutrality approach to the Free Exercise Clause has eliminated constitutional protection for religious individuals and institutions whose practices run contrary to the secular rules of the modern state. But the Court's more deferential approach to the Establishment Clause has the opposite effect: it permits the political branches wide latitude to soften the effect of regulation on religious practice through appropriate accommodations. Fortunately, the value of religious liberty is well recognized in the political sphere, and accommodations are not uncommon, even for the benefit of relatively small religious groups.

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n290 McDaniel, 435 US at 639 (Brennan concurring).

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Under the Burger Court, legislative accommodations of religion were treated with suspicion, and not infrequently invalidated on flimsy pretexts. The Court never held that accommodation is unconstitutional in principle, but the Lemon test made accommodations difficult to defend. Accommodations of religion have no "secular purpose," if "secular purpose" means a purpose solely relating to nonreligious concerns. The effect of accommodations is to make the practice of religion easier, and therefore, in all probability, more widespread. And some accommodations require the government to make judgments regarding religious beliefs and needs. This is easily characterized as "entanglement."

Thus, in Thornton v Caldor, Inc., n291 the Court overturned a Connecticut law accommodating the needs of sabbath-observing employees on the ground that the supposedly "absolute" language of the statute could lead to extreme and unconstitutional burdens on others. This deviated from the usual principles of constitutional adjudication, since on an "as applied" basis the burden was not unreasonable and on a "facial" basis the statute was plainly susceptible to constitutional applications. And in Wallace v Jaffree, n292 the Court overturned an Alabama statute accommodating the [*182] needs of those public school students who wished to begin the school day with prayer by instituting a moment of silence. Although agreeing that a moment of silence is not generally unconstitutional, the Court overturned this particular statute on the basis of an out-of-context quotation from a single legislator, uttered after the statute had passed, that the statute was intended to restore "voluntary prayer" to the Alabama schools. Since the full context of the legislators' remarks indicated a legitimate purpose n293 (and since there was no reason to impugn the intentions of the rest of the legislature), striking down the law was at best an overreaction. The message conveyed by these decisions was that accommodations would be evaluted with a critical eye.

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n291 472 US 703 (1985).

n292 472 US 38 (1985).

n293 See id at 86-87 (Burger dissenting).

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More recent cases suggest a different posture. I have already discussed Corporation of Presiding Bishop v Amos, in which the Court unanimously upheld a statute exempting religious organizations from the religious nondiscrimination regulations of Title VII, which had been struck down by a lower court under Lemon. And in Smith, the Court stated in dictum that an exemption for the sacramental use of peyote would be permissible under the Establishment Clause. Texas Monthly, Inc. v Bullock presents a more ambiguous picture. A divided Court, issuing four inconsistent opinions, struck down a Texas law exempting religious publications from a sales tax. As Justice Scalia's dissenting opinion demonstrated, a court sympathetic to accommodations could have upheld the statute on the ground that it resembled what the Court had held to be constitutionally required in two cases in the 1930s. As even Justice Blackmun commented, the Court's approach appeared to elevate establishment concerns to the subordination of free exercise. n294 But the opinion for the plurality -- unlike the opinions in Jaffree and Caldor -- took pains to emphasize that properly drafted accommodations are constitutionally permissible, even when they go beyond the dictates of the Free Exercise Clause. n295 Thus, the combined effect of Amos, Smith, and Texas Monthly is to affirm the legitimacy of exemptions and accommodations designed to protect religious individuals or organizations from the infringements of the regulatory state. n296

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n294 Texas Monthly, 109 S Ct 890, 906 (1989) (Blackmun concurring).

n295 Id at 899-900.

n296 For a more comprehensive analysis of the recent accommodation decisions and justification for the doctrine, see McConnell, (Geo Wash L Rev, forthcoming 1992) (cited in note 233).

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[*183] 3. Equal access to public resources.

One of the most important eighteenth-century abuses against which the no-establishment principle was directed was mandatory support for churches and ministers. This system was support for religion qua religion; it singled out religion as such for financial benefit. Secular institutions, activities, and ideologies received no comparable form of assistance. Religious assessments were eliminated in Virginia, Maryland, and most of the southern states by 1789, and in New England by 1834. n297 As the Supreme Court has noted, the struggle against religious assessments was a central event in the development of the philosophy of the Religion Clauses of the First Amendment. n298

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n297 See McConnell, 103 Harv L Rev at 1436-37 (cited in note 100).

n298 Everson, 330 US at 13.

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In the ensuing 150 years, the government began to assist in a wide range of charitable and educational activities, formerly left to private (frequently religious) endeavor. Frequently, the government chose to enter these fields not by setting up its own agencies, but by making financial contributions to private institutions that supplied services to the public. Common examples included higher education, hospitals, and orphanages. An advantage of private administration over public was that it preserved diversity, since different institutions would bring a different perspective and approach to the activity. The ultimate beneficiaries thus had a degree of choice. A student interested in a Catholic education could go to a Catholic college; a patient needing to keep to a kosher diet could go to a Jewish hospital; a dying mother wanting her child to be raised as a Protestant could designate a Protestant orphanage. A citizen need not forfeit public benefits as a condition to exercising the religious option. In its only case involving government aid to a religious institution prior to 1947, Bradfield v Roberts, the Court held that the religious affiliation of a Catholic hospital was "wholly immaterial" to its right to receive government funds. n299

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n299 175 US 291, 298 (1899).

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When government funding of religiously-affiliated social and educational services became a constitutional issue in the late 1940s, the Court properly looked back at the religious assessment controversy. But it missed the point. The Court did not notice that the assessments against which the advocates of disestablishment inveighed were discriminatory in favor of religion. Instead, the Court concluded that taxpayers have a constitutionally protected [*184] immunity against the use of their tax dollars for religious purposes. n300 This immunity necessitated discrimination against religion, thus turning the neutrality principle of the assessment controversy on its head.

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n300 See Everson, 330 US at 16 ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.") See also Flast v Cohen, 392 US 83, 103-04 (1968).

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The Court's analysis failed to recognize the effect of the change in governmental roles. When the government provides no financial support to the nonprofit sector except for churches, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does not aid religion. It aids higher education, health care, or child care; it is

neutral to religion. Indeed, to deny equal support to a college, hospital, or orphanage on the ground that it conveys religious ideas is to penalize it for being religious. It is a penalty whether the government excludes the religious institution from the program altogether, as in Lemon, n301 Nyquist, n302 and Grand Rapids, n303 or requires the institution to secularize a portion of its program, as in Tilton v Richardson, n304 Roemer, n305 or Hunt v McNair. n306

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n301 403 US at 606-07.

n302 413 US at 761-69.

n303 473 US at 375-81.

n304 403 US 672, 676-84 (1971).

n305 426 US at 755-67.

n306 413 US 734, 736-49 (1973).

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The underlying issue is precisely the same as that in Sherbert v Verner. The question in Sherbert was whether the state could deny benefits to an individual otherwise eligible for unemployment compensation on the ground that she refused to make herself available for work on her sabbath day. n307 The Court recognized that the denial of a benefit, under such circumstances, is equivalent to a "fine" for adhering to her religious convictions. n308 Justice Douglas, a ferocious opponent of nondiscriminatory "aid" to religious institutions, well understood the point in Sherbert:

The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in [*185] terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

These considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker. . . . Thus, this case does not involve the problems of direct or indirect state assistance to a religious organization -- matters relevant to the Establishment Clause, not in issue here. n309

The same point applies to nondiscriminatory support for hospitals, colleges, orphanages, and schools. The government supports them not as religious institutions but as colleges, hospitals, orphanages, and schools. To deny benefits to an otherwise eligible institution "forces [it] to choose between following the precepts of [its] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [its] religion in order [to obtain support], on the other hand." n310 If the Court was correct to abandon the right-privilege distinction under the Free Exercise Clause, and I believe it was, the Court was illogical and inconsistent to hold to the right-privilege distinction under the Establishment Clause. Equal access to public resources

is not a "privilege," and it does not violate the Establishment Clause.

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n307 374 US at 403.

n308 Id at 404.

n309 Id at 412-13 (Douglas concurring).

n310 Sherbert, 374 US at 404.

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This inconsistent application of the right-privilege distinction is the most fundamental cause of the contradiction between the Lemon test and the Free Exercise Clause. Lemon assumes an outmoded conception of government aid, which treats equal access as "aid." The Free Exercise Clause, at a minimum (that is, after Smith), prohibits discrimination against an institution solely on the ground that it is religious. n311 The Lemon test outlaws nondiscriminatory treatment and the Free Exercise Clause requires it.

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n311 Smith, 110 S Ct at 1599.

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We must therefore reject the central animating idea of modern Establishment Clause analysis: that taxpayers have a constitutional right to insist that none of their taxes be used for religious purposes. Properly conceived, the taxpayer has a right to insist that the government not give tax dollars to religion qua religion, or in a way that favors religion over nonreligion, or one religion over another. But the taxpayer has no right to insist that the government [*186] discriminate against religion in the distribution of public funds. In this pluralistic country, taxpayers come in all varieties of belief and unbelief. To tax everyone, but to dispense money only to secular organizations, is to use government's coercive power to disadvantage religion. n312

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n312 See Michael McConnell, Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause, 26 San Diego L Rev 255 (1989). Professor Sullivan agrees that there "can be little doubt" that religious speech restrictions on recipients of public funds "would be a disincentive to the exercise of unfettered choice," Sullivan, 59 U Chi L Rev at 213 (cited in note 5), and thus would constitute an unconstitutional condition under free speech precedents. Id. She rescues the conditions from this conclusion on the ground that they are "necessitated by the Establishment Clause," which she reads as a "constitutional requirement not to support religious teaching with public funds." Id at 212. But she never explains why she adopts a reading of the Establishment Clause that appears to violate fundamental principles of freedom of speech (let alone free exercise of religion), when it is possible to avoid this conflict by simply interpreting the Establishment Clause as forbidding government preference for religion over nonreligion (or one religion over

another), as was done in Everson.

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Moreover, it follows that if religious organizations have a constitutional right to equal access to public programs, the government may not condition their access on rules which burden their practice of religion, unless the rules are closely related to the purposes of the program. For example, if the government made grants to organizations providing vocational training, the government could not, in effect, exclude Jewish organizations by requiring all recipients to remain open on Saturday, unless Saturday operations could be persuasively shown to be necessary to the successful conduct of the program. Similarly, if the government provided vouchers for education, the government could not exclude Catholic schools by requiring that recipient schools distribute birth control devices to the students, unless birth control distribution is necessary to education. The test is the same as in any other free exercise case. The threat of loss of funding is an "indirect" burden on the exercise of religion, and cannot be allowed unless there is an overriding governmental purpose. Conditions on spending are indistinguishable in principle from direct regulation.

This does not mean that all participants in government programs have an unlimited constitutional right to engage in religious speech in the context of the program. The test is whether participants have the right to engage in political or other controversial secular speech. n313 Religious speech rights are not superior; nor are they inferior. Thus, in government programs in which grantees are paid to convey a particular message to the public (and no other), [*187] religious speech restrictions are permissible and may even be required. In Bowen v Kendrick, n314 for example, the federal government made grants to various public and private organizations, including some affiliated with religion, for the purpose of conducting programs to promote responsible attitudes toward sex among adolescents. The government forbade grantees to "teach or promote religion" in the course of the funded programs, and the Supreme Court held that this restriction is mandated by the Establishment Clause. Since this was not a program that permitted free speech about controversial topics of the grantees' choice, but instead one based on structured curricula approved in advance by the federal agency, any claim of free speech rights was properly rejected. n315

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n313 In the context of public forum analysis, Justice Stevens advocates a similar position. See Mergens, 110 S Ct at 2384 (Stevens dissenting).

n314 487 US 589 (1988).

n315 The case is similar to Rust v Sullivan, 111 S Ct 1759 (1991), in which the government provides grants to groups for the encouragement of pre-conception family planning, and bars speech encouraging abortion.

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By contrast, it would not be permissible to restrict the rights of artists receiving grants under the National Endowment for the Arts to produce art on religious themes. If artists can convey controversial messages about politics

and culture without censorship, it would be unconstitutional to deny them a similar right when they convey messages about religion. Nor was it permissible for the Virginia Supreme Court to deny eligibility for tax-exempt bonds to Liberty Baptist College on the basis of its religious teaching. n316 If secular institutions enjoy the academic freedom to determine the content of their teaching, so should Liberty Baptist. Nor should a college professor be forbidden to discuss his religious beliefs in class or in after-class meetings, when other members of the faculty are free to discuss their personal and professional opinions. n317 Nor should a high school valedictorian's speech be censored on account of its religious content when speakers in other years are permitted to address controversial issues of their choice. n318 That each of these examples has been resolved the other way by lower courts or administrators demonstrates how far we have to go before achieving genuine religious pluralism.

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n316 Phan v Commonwealth of Virginia, 806 F2d 516 (4th Cir 1986).

n317 This is the issue in Bishop v Aronov, 926 F2d 1066 (11th Cir 1991), petition for cert pending, No 91-286. I am counsel for the petitioner.

n318 Guidry v Calcasieu Parish School Bd, 9 Religious Freedom Rptr 118 (E D La 1989), affirmed, 897 F2d 181 (5th Cir 1990).

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[*188] 4. Government influence over education and culture.

A final threat to religious autonomy arises from governmental control over many of the institutions of education and culture. In an earlier era, when these were under private control, the government's voice was far less prominent in the marketplace of ideas. The influence of government is likely to foster homogeneity with respect to religion, since it is likely to reflect a broadly acceptable, majoritarian view of religion -- in short, to support a civil religion.

If it were possible to insist that government be "neutral" in its speech about religion, this would be highly desirable. Unfortunately, in the context of government speech -- unlike regulation and spending -- "neutrality" is an unattainable ideal. n319 Whenever the government communicates to the people, it will favor some ideas and oppose others. The only truly effective way to reduce government influence on our religious lives through its speech would be to reduce the governmental presence in our cultural and educational institutions. Requirements of accommodation and equal treatment can solve (or at least greatly mitigate) the problems created by the regulatory and spending powers, but there are no real solutions to the problems created by the government's vastly increased role in the culture.

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n319 This is my principal area of disagreement with Professor Laycock. See Laycock, 39 DePaul L Rev 893 (cited in note 162).

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There are three baselines from which the neutrality of government speech might theoretically be evaluated. The first is complete secularization of the public sphere. If the "neutral" position were one in which religion is completely relegated to the private sphere of family and the institutions of private choice, any reference to religion in the public sphere would be a departure from neutrality. This is the position advocated by Professor Sullivan, who says that the solution to the government speech problem is "simple" if we would only "[b]anish public sponsorship of religious symbols from the public square." n320

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n320 Sullivan, 59 U Chi L Rev at 207 (cited in note 5).

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Serious enforcement of this position would bring about a radical change in the cultural fabric of the nation. Initial litigation has focused on what have been called "distinctively religious elements," n321 such as creches, crosses, and menorahs. But multitudes of other symbols, deeply engrained in our public culture, are no less distinctively religious. Christmas trees are symbols of Christmas, too, and many non-Christians (not to mention some Christians) [*189] consider them inappropriate for secular institutions. n322 Certainly the star on top of the tree is a religious symbol. And if the star is a religious symbol, so are the pretty lights along the sidewalks of Michigan Avenue in downtown Chicago. Although most of us do not recognize the symbolism, these lights signify the advent of what the gospel of John calls the "true light that enlightens every man." n323 Thanksgiving conveys a religious message, as do the speeches of Abraham Lincoln and the Reverend Martin Luther King, Jr. -- which would have to be censored before they could be made a part of public celebrations. Many of our cities have religious names; many of our historic sites reflect religious aspects of the culture. To strip public property of all religious elements (when public property is used to convey secular messages of every kind and description) would have a profoundly secularizing effect on the culture.

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n321 Lynch, 465 US at 711 (Brennan dissenting).

n322 Oddly, the Court has treated Christmas trees as such a "preeminently secular symbol" that they actually drain nearby religious symbols of their religious content. Allegheny, 492 US at 617, 634. Yet every year the Justices' own law clerks raise an internal fuss over the Christmas tree in the Great Hall of the Supreme Court building.

n323 John 1:9 (Revised Standard Version).

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The problem with the secularization baseline is that it is not neutral in any realistic sense. A small government could be entirely secular, and would have little impact on culture. But when the government owns the street and parks, which are the principal sites for public communication and community celebrations, the schools, which are a principal means for transmitting ideas

and values to future generations, and many of the principal institutions of culture, exclusion of religious ideas, symbols, and voices marginalizes religion in much the same way that the neglect of the contributions of African American and other minority citizens, or of the viewpoints and contributions of women, once marginalized those segments of the society. Silence about a subject can convey a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, cultures, and ideological commitments, to exclude all those whose basis is "religious" would profoundly distort public culture.

A useful thought experiment is to imagine what a "neutral" policy toward religion would look like in a socialist state, where the government owned all the land and all the means of mass communication. In such a world, the government would be constitutionally required to erect and maintain churches, synagogues, temples, mosques; to hire priests, ministers, imans, and rabbis; to disseminate [*190] religious tracts and transmit religious programming; and to display religious symbols on public land at appropriate occasions. If it did not, there would be no opportunity for the practice of religion as traditionally understood. Indeed, a "neutral" state would attempt to replicate the mix of religious elements that one would expect to find if the institutions of culture were decentralized and private -- much as the government must do today in the prisons and the military. n324 No one would contend, in a socialist context, that a policy of total secularization would be neutral.

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n324 Of course, any such attempt would surely fall short of a genuinely decentralized, private pluralism. That is one reason (of many) why liberty is best protected under a regime of limited government.

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To be sure, we do not live in a socialist state. But we have socialized many of the important avenues for public interchange and the transmission of culture. Within that sphere, total secularization is not a "neutral" answer, either. Even Justice Brennan has warned that too zealous an elimination of religious symbols might appear as "a stilted indifference to the religious life of our people." n325 Thus, there is a growing consensus that the public schools have erred in eliminating from the curriculum virtually all discussion of how religion has influenced history, culture, philosophy, and ordinary life. n326 For the most part, this decision by the schools has reflected a cowardly tendency to avoid anything controversial, but the effect is to create a distorted impression about the place of religion in public and private life. As psychologist Paul Vitz has explained, excluding religious references biases the curriculum "because it makes only the liberal, secular positions familiar and plausible. [Other] positions are made to appear irrelevant, strange, on the fringe, old-fashioned, reactionary." n327

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n325 Lynch, 465 US at 714 (Brennan dissenting).

n326 For a summary of research showing that public school curriculum systematically neglects the subject of religion, see McConnell, 1991 U Chi Legal F 123 (cited in note 33).

n327 Paul C. Vitz, Censorship: Evidence of Bias in Our Children's Textbooks 77-78 (Servant Books, 1986).

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Some argue for a totally secular public sphere not on the spurious ground that this would be "neutral," but on the ground that the First Amendment committed the United States to a certain public philosophy: a liberal, democratic, secular "civil religion," which is entitled to a preferred status -- even a monopoly status -- in our public culture. n328 As an historical assertion about [*191] the meaning of the First Amendment, however, this position is plainly false. Virtually the entire spectrum of opinion at the time of the adoption of the First Amendment expected the citizens to draw upon religion as a principal source of moral guidance for both their private and their public lives. n329 The Establishment Clause prevented the federal government from interfering with the process of opinion formation by privileging a particular institution or set of religious opinions, n330 but it left the citizens free to seek guidance about contentious questions from whatever sources they might find persuasive, religious as well as secular. n331 As a normative proposition, the secularization position must depend on an argument that secular ideologies are superior to religious. But some secular ideologies are divisive, exclusionary, and evil; just as some religious ideologies are tolerant, open-minded, and beneficent (and vice-versa). The republican solution is to leave the choice of public philosophy to the people. There is a great irony in the claim that liberal, democratic, nonsectarian positions have a superior constitutional status to religious positions. Such a position is illiberal (since it denies the people's right to determine what will bring about the good life), undemocratic (since it conflicts with the democratic [*192] choices of the people), and sectarian (since it is based on a narrow point of view on religious issues).

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n328 This is the crux of my disagreement with Professor Kathleen Sullivan in this debate. See Sullivan, 59 U Chi L Rev at 198-201 (cited in note 5). See also John Mansfield, The Religion Clauses of the First Amendment and the Philosophy of the Constitution, 72 Cal L Rev 847 (1984), and Dworkin, 59 U Chi L Rev 381 (cited in note 256).

n329 A few statements from leading figures of the day will give a sense of their attitude. Madison thought that "belief in a God All Powerful wise & good, is so essential to the moral order of the World & to the happiness of man, that arguments which enforce it cannot be drawn from too many sources." Letter from James Madison to Frederick Beasley (Nov 20, 1825), in Gaillard Hunt, ed, 9 The Writings of James Madison 229, 230 (G. P. Putnam's Sons, 1910). Washington warned: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion." George Washington, Farewell Address (Sep 17, 1796), reprinted in Henry Commager, ed, Documents of American History 169, 173 (Prentice-Hall, 9th ed 1973). Adams maintained that "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter from John Adams to the officers of the First Brigrade of the Third Division of the militia of Massachusetts (Oct 11, 1798), in Charles Francis Adams, ed, 9 The Works of John Adams 228, 229 (Little Brown, 1854).